SHOW PROCEEDINGS AND ORDERS DATE: [07/02/96

CASE NBR: [95101773] CFX STATUS: [DECIDED
SHORT TITLE: [Texas, et al.]
VERSUS [Hopwood, Cheryl, et al.] DATE DOCKETED: [043096]
PAGE: [01

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 30 1996		Petition for writ of certiorari filed. (Response due May 30, 1996)
Apr 30 1996		Appendix of petitioner filed.
May 13 1996		Motion of petitioner in No. 95-1845 to have this petition considered with Thurgood Marshall Legal v. Hopwood, No. 95-1845, filed.
May 24 1996		Request by respondents for extension of time to June 28, 1996 to file response to petition for writ of certiorari submitted to Justice Scalia.
May 24 1996		Request denied by Justice Scalia.
May 24 1996		Brief amicus curiae of United States filed.
May 28 1996		Waiver of right of respondents Kenneth Elliott and David Rogers to respond filed.
May 30 1996		Brief of respondents Cheryl J. Hopwood, et al. in opposition filed.

Last page of docket

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May 30 1996		LODGING consisting of one copy of press release and statement issued by the Attorney General of Texas dated April 30, 1996 submitted by counsel for the respondents.
May 30 1996		Brief amici curiae of Maryland, et al. filed.
Jun 3 1996		Reply brief of petitioners State of Texas, et al. filed.
Jun 5 1996		DISTRIBUTED. June 21, 1996
Jun 21 1996		REDISTRIBUTED. June 28, 1996
Jun 24 1996		Motion of petitioner in No. 95-1845 to have this petition considered with Thurgood Marshall Legal v. Hopwood, No. 95-1845, GRANTED.
Jul 1 1996		Petition DENIED. Opinion respecting the denial of certiorari by Justice Ginsburg with whom Justice Souter joins. (Detached opinion.)

****

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*, *Petitioners*

vs.

CHERYL J. HOPWOOD, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Should the federal judiciary discard the teaching of *Regents of the University of California v. Bakke*, and prohibit state institutions of higher learning from even *considering* race, among other factors, in individualized admissions decisions, despite the institutions' long-settled educational interest in promoting dialogue and learning by selecting a diverse student body with varied backgrounds and experiences?

2. When a State's officials determine that they have a sufficient evidentiary basis for concluding that remedial race-conscious action is needed at one of the State's graduate schools, which itself had practiced *de jure* discrimination in the past, and whose legacy of having done so continues to affect its ability to attract and educate the best students of all races, do the Fourteenth Amendment and principles of federalism permit the federal judiciary: (a) to insist that those officials disregard the additional current effects, on that graduate school's applicant pool, of *de jure* discrimination in the public education of Blacks and Mexican Americans in that State at the primary, secondary, and college levels, and (b) to demand that those officials heed only findings made by the State Legislature itself rather than, as state law permits, acting on findings made by the Governor and the State Higher Education Coordinating Board?

3. Are Texas higher education admissions officials, following *United States v. Fordice*, precluded from taking race into consideration even though a race-blind admissions process would predictably recreate a system that is effectively segregated, with almost no minorities at the State's flagship law school and almost no white students at the law school that the State created to avoid integration?

4. Is Title VI of the Civil Rights Act of 1964, enacted under the Spending Clause of Article I, capable of abrogating a State's Eleventh Amendment immunity from suit in federal court without its consent, in light of *Seminole Tribe of Florida v. Florida?*

5. May a federal court, consistent with *Carey v. Piphus*, impose a presumption of compensatory damages for plaintiffs who complain of the process that was applied to them, but who have not shown any likelihood that they would have received a different result under a constitutionally flawless process?

6. May a federal court, consistent with Article III, award prospective relief against a State and its officials regarding a law school admissions policy, when the effects of that policy are not before the court and the "case" or "controversy" requirement is not met by any showing of actual harm the litigants would be likely to suffer in the future without such prospective relief?

PARTIES TO THE PROCEEDING

The petitioners (defendants-appellees in the courts below) are:

The State of Texas
The University of Texas Board of Regents
Bernard Rapoport, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert J. Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Martha E. Smiley, and Mario E. Ramirez, in their official capacities as members of the University of Texas Board of Regents
The University of Texas at Austin
Robert M. Berdahl, in his official capacity as President of the University of Texas at Austin
The University of Texas School of Law
Mark G. Yudof, in his official capacity as Dean of the University of Texas School of Law
Stanley M. Johanson, in his official capacity as Professor of Law at the University of Texas School of Law

The respondents (plaintiffs-appellants in the courts below) are:

Cheryl J. Hopwood
Douglas W. Carvell
Kenneth R. Elliott
David A. Rogers

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INTRODUCTION

In the decision below, the Court of Appeals for the Fifth Circuit held that an institution of higher learning, the University of Texas School of Law, is prohibited from considering race in any manner in its admissions processes. This decision is the first of its kind by any federal court. In promulgating its far-reaching rule, the court of appeals took it upon itself to overrule, anticipatorily, the holding of a five-Justice majority in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and called into question the permissibility of considering race in admissions programs in public colleges, universities, and professional schools throughout the country. The national significance of the decision is obvious. Moreover, even apart from the equal protection issue, this case presents fundamental questions of state sovereignty and federal judicial power.

There is more than a touch of irony that this case should arise out of the same institution, the University of Texas School of Law, that provided the basis for this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), overturning the official state ban on the admission of Blacks to the School of Law. There is also a harsh irony that this case should arise from the State of Texas. The undisputed record shows that Texas students applying to the challenged 1992 incoming class were largely the products of a public school system that was still under court supervision for failing effectively to remedy unconstitutional *de jure* segregation. Not contested below, but unmentioned in the Fifth Circuit's opinion, is the effective resegregation of the University of Texas School of Law that would result if the Fifth Circuit's decision were left intact. The School of Law is the State's flagship institution, charged with training the leaders of the State and beyond. The Fifth Circuit's decision would have produced, in a State whose population approaches forty percent Blacks and Mexican Americans, a 1992 incoming class with at most a handful of Blacks and Mexican Americans, out of more than five hundred students.

The central question before this Court is whether the Constitution compels this result.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, filed March 18, 1996 (Appendix A), is to be reported at 78 F.3d 932. The opinion of the United States District Court for the Western District of Texas, dated August 19, 1994 (Appendix B), is reported at 861 F. Supp. 551. On April 4, 1996, the Court of Appeals entered an order denying rehearing en banc and indicating that a dissent from the denial of rehearing en banc was forthcoming. Appendix C. On April 19, 1996, the Court of Appeals, pursuant to FED. R. APP. PROC. 41, stayed its mandate until May 13, 1996, to permit the filing and disposition of a petition for certiorari. Appendix D. On April 23, 1996, the Fifth Circuit released two opinions, joined by a total of seven of the Court of Appeals' seventeen active judges (one of whom had recused himself), dissenting from the Court's failure to grant rehearing en banc. Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was filed on March 18, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. III
United States Constitution, amendment XIV
United States Constitution, amendment XI
Title VI of the Civil Rights Act of 1964,
42 U.S.C. § 2000d-7(a)(1)
42 U.S.C. § 1981
42 U.S.C. § 1983
These provisions are printed in Appendix F.

STATEMENT OF THE CASE

Proceedings Below

Respondents are four white applicants denied admission to the 1992 entering class at The University of Texas School of Law (the "Law School"). This action was filed in the United States District Court for the Western District of Texas. Respondents alleged that petitioners administered a racially discriminatory admissions program at the Law School, in violation of the Fourteenth Amendment to the United States Constitution; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and 42 U.S.C. §§ 1981 and 1983. But for the Eleventh Amendment, the district court would have had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Petitioners moved for summary judgment on the ground, inter alia, that the Eleventh Amendment precluded this action against the State of Texas, its subdivisions, and officers acting in their official capacities. The district court denied that motion in an unpublished opinion dated October 28, 1993. R. 588-605.

After an eight-day bench trial in May 1994, the district court declared invalid the Law School's 1992 admissions procedure insofar as it employed a separate subcommittee for evaluating minority applicants. App. at B58-59. The court held this aspect of the 1992 procedure constitutionally infirm because it was not narrowly tailored to meet the State's compelling interests in seeking the educational benefits that flow from having a diverse student body and in redressing the continuing effects of discriminatory practices by the educational hierarchy of Texas. The district court held that it did not need to decide the constitutionality of a second feature of the 1992 procedure — the use of different presumptive denial scores for minority and nonminority candidates — because "none of the plaintiffs in this lawsuit was affected directly by this aspect of the 1992 procedure." *Id.* at B52 n.71. The State did not appeal the district court's ruling with respect to the 1992 policy, having abandoned that policy in 1994 in favor of one that treated race as simply a factor in the

individualized consideration and comparison of applicants to the Law School.

In crafting a remedy, the district court awarded respondents nominal damages only, because the State had shown "that legitimate, nondiscriminatory grounds exist for the Law School's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process." App. at B65. The court explained that 109 *nonminority* residents with numerical scores *lower* than Hopwood's were offered admission, and that sixty-seven nonminority residents with numerical scores lower than the other three plaintiffs were admitted, leading to the inference that weaknesses in respondents' applications, completely apart from their numerical scores, had triggered the Law School's decision not to admit them. *Id.* at B63-64.[1] In fact, the court observed that "it appears that the majority of applicants, both minority and nonminority, made considerable effort to inform the admissions committee of their special qualifications through extensive answers to the questions on the application form or through personal statements," and "[m]ost files contained one, if not several, letters of recommendation." *Id.* at B64. Respondents' files were notably bare. "In fact, of all the applications the Court reviewed, Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance, despite her relatively high numbers." *Id.*

The court declined to impose prospective injunctive relief with respect to the Law School's admissions policy because the Law School had adopted a new admissions policy during the litigation that "appears to remedy the defects the Court has found in the 1992 procedure," App. at B67, and because "neither a plaintiff denied admission under the new system nor evidence of the practical application of the new procedure is before this Court." *Id.* Under the new policy, the Law School does not use a separate minority subcommittee or different presumptive admission or

[1] Hopwood's score was the highest of any of the respondents.

denial scores for minority and nonminority applicants. *Id.* at B67 n.87. Each candidate is given fully individualized treatment on his or her own merits; race is considered, along with myriad other matters, such as socio-economic status, employment history, extra-curricular activities as an undergraduate, and other factors that make up a person's life experiences and affect what the person can contribute to the educational dialogue, both inside class and out. Although the Law School attempts to meet the targets (established by the Office for Civil Rights of the U.S. Department of Education) of ten percent Mexican American students and five percent Black students in an entering class, these targets are purely aspirational.[2]

The district court ordered that respondents be permitted to reapply under the new policy without being charged an application fee. App. at B67-68. But the court denied attorney's fees to respondents, on the ground that they had "failed to prove they would have been offered admission under a constitutional procedure" and "the *de minimis* nature of the relief the plaintiffs received is insufficient to justify an award of attorney's fees." *Hopwood v. State of Texas*, No. A-92-CA-563, mem. op. at 2, 4 (Nov. 14, 1994).

The court of appeals for the Fifth Circuit reversed, holding broadly that "the law school may not use race as a factor in law school admissions." App. at A3. With respect to the State's interest in enriching the educational experience of all its law students by encouraging the admission of, among others, Blacks and Mexican Americans, the court of appeals held that "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of a number of factors, is unconstitutional. . . . [T]he use of race *per se* is proscribed . . . ." *Id.* at A27. The Fifth Circuit opined that the consideration of race to promote diversity "is no more rational

[2] The district court, reviewing the statistics and evaluating the credibility of Admissions Committee members, found that the Law School's targets even in the 1992 admissions process were not rigid quotas, but "are aspirations only, subject to the quality of the pool of applicants." App. at B24.

on its own terms than would be choices based upon the physical size or blood type of applicants." *Id.* at A26.

With respect to remedying the present effects of *de jure* discrimination in Texas public education, the court held that the Law School was the *only* "relevant . . . past discriminator." App. at A40. "As a result, past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions." *Id.* at A45.

The court of appeals ruled that the district court erred in requiring the plaintiffs to prove that they had been injured by the Law School admissions procedures in place in 1992. Instead, the court held that "once discrimination is proved, the defendant bears the burden of proving no damage." *Id.* at A49 n.53. Accordingly, the court remanded to the district court the task of calculating compensatory damages.

The court of appeals also issued a series of "judicial instruction[s]" to the Law School, commanding it not to consider race as a factor in the admissions process "for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school." *Id.* at A55.

Judge Wiener, specially concurring, "respectfully disagree[d] with the panel opinion's conclusion that diversity can never be a compelling governmental interest in a public graduate school." *Id.* at A64. He nonetheless concluded that the 1992 Law School admissions process was not narrowly tailored to this interest. Judge Wiener also expressed reservations about the scope of relief issued by the court, warning that the majority had "inappropriate[ly]" issued "a de facto injunction" against respondents. *Id.* at A73. He cautioned that the plaintiffs had challenged "only the admissions process employed by the law school in 1992 -- not the admissions process that was in place and employed in 1995, not the admissions process that is being

employed in 1996, and not the admissions process to be applied in any future years." *Id.* at A75.

On April 4, 1996, the court of appeals denied rehearing en banc and announced that a dissent from the denial of rehearing would be released. Appendix C. On April 19, 1996, the court of appeals granted petitioners a 28-day stay pending the filing and disposition of this petition for writ of certiorari. In light of "the magnitude of the case" and "the importance of the issue," the court determined that "there is a reasonable chance that four Justices will vote to grant certiorari." The court also held that petitioners had met their burden of demonstrating irreparable injury in the absence of a stay.

On April 23, 1996, the court of appeals released two opinions dissenting from the Fifth Circuit's failure to grant en banc rehearing. Chief Judge Politz, joined by six other judges, filed a dissent warning that the panel's opinion "will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation." App. at E3. The Chief Judge described the court's decision as "a text book example of judicial activism" and "a frontal assault on contrary Supreme Court precedent." *Id.* "[T]he panel charted a path into terra incognita. Judicial restraint was the first casualty; it proved to be too burdensome. The teachings proscribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule *Bakke*." *Id.* at E7:

> By tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling *Bakke*. . . . The syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell's diversity

> conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of *Bakke*.

App. at E3, 7.

Judge Stewart filed a separate dissent from the Court of Appeals' failure to grant rehearing en banc, in order "to underscore the [court's] lack of historical perspective and sensitivity." App. at E9. Judge Stewart observed that the University of Texas School of Law was the same institution whose admissions policies were at issue in *Sweatt v. Painter*, 339 U.S. 629 (1950). He also noted that, in holding that the Law School had violated the Equal Protection Clause by excluding Heman Sweatt, this Court explicitly adhered to the " 'principle of deciding constitutional questions only in the context of the particular case before the Court,' drawing its decision 'as narrowly as possible.' " *Id.* (quoting 339 U.S. at 631). Judge Stewart criticized the Fifth Circuit majority for disregarding that guiding principle here, calling its failure to grant rehearing en banc a "travesty." *Id.* at E10.

Statement of Facts

"Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute." *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994); *id.* at 915 (King, J., dissenting). The district court confirmed this history in extensive factual findings that the court of appeals did not disturb. App. at B3-10.

In 1977, the District Court for the District of Columbia ordered the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (HEW) (now the Department of Education or DOE) to investigate discrimination in Texas' system of higher education. App. at B6-8; D296. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.mexican), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973), *dism'd sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C.

Cir. 1990). Following a two-year investigation, OCR found in 1980 that Texas had failed to eliminate the vestiges of its segregated higher education system and was in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

As a remedy, Texas agreed to adopt the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan).[3] OCR required that the Texas Plan include a commitment to "seek to achieve proportions of Blacks and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs." App. at B9 n.6; D238a at 5.

In 1983, just eight years before respondents applied to the Law School, Texas agreed, under threat of federal action, to formulate an acceptable plan to desegregate its higher education system, including the Law School. But in January 1994, the Department of Education notified Governor Richards that OCR was still overseeing Texas' desegregation efforts and would review the Texas system in light of *United States v. Fordice*, 505 U.S. 717 (1992). App. at B10. DOE has yet to determine that Texas' higher education system has come into compliance with Title VI and the Fourteenth Amendment. *Id.*

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[3] The initial version of the Texas plan included a general commitment to equal educational opportunity and student body desegregation for both Blacks and Hispanic students. App. at B8.; D237. In 1982, then Assistant Secretary of Education Clarence Thomas informed then Governor of Texas, William Clements, that the Texas Plan was deficient because the numeric goals for Blacks and Hispanic enrollment in graduate and professional programs were insufficient to enroll these minorities in proportion to their representation among graduates of the state's undergraduate institutions. App. at B8; D284. OCR recommended, among other measures, that each Texas professional school reevaluate its admissions criteria and "admit Blacks and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." App. at B9; D220.

In 1983, as a higher education desegregation plan was still being formulated, respondents Elliott and Rogers were students at the University of Texas. P153; P171.[4] Respondent Carvell was attending Texas public schools. P151. As the district court found, during the 1980s most Texas students lived in school districts whose public schools the federal courts and the United States Department of Justice had determined were still unconstitutionally segregated. App. at B46; D434. Over seventy percent of Blacks in Texas lived in metropolitan areas operating under court-ordered desegregation plans. 19 Tr. 43; D378B. Many school districts were found to practice official discrimination against Mexican-American as well as against Black students. App. at B4.[5] On the eve of trial, which fell on the fortieth anniversary of *Brown v. Board of Education*, 347 U.S. 483 (1954), federal and private desegregation lawsuits were still pending against over forty Texas school districts. App. at B4; D457.

The district court found that Texas residents who applied for admission to the Law School in fall 1992 would have spent most, if not all, of their pre-college education in a school system

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[4] Hopwood was attending community college in California. P145. Rogers attended the University of Texas intermittently from 1982 until 1985, when he flunked out. He was first placed on scholastic probation effective spring semester 1983. P171.

[5] In 1983, the Court of Appeals for the Fifth Circuit found that Ector County "not only continued to fail to meet its duty to dismantle its dual school system, but actually increased the segregation in its schools of both Blacks and Mexican Americans" and that its "violation of the Constitution was not only clear but egregious." *United States v. Crucial*, 722 F.2d 1182, 1184-85, 1188 (5th Cir. 1983). That same year the court concluded that Dallas public schools not only were still segregated, but had "opposed any student . . . desegregation, no matter how feasible or how minimal." *Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983). Fort Worth still was not unitary. *Flax v. Potts*, 567 F. Supp. 859, 861 (N.D. Tex. 1983). And Houston had recently been declared unitary, but only because demographic and other changes made effective desegregation infeasible. See, *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218 (5th Cir. 1983).

suffering the effects of unconstitutional segregation. App. at B46. The court found that official discrimination had "handicapped the educational achievement of many minorities." *Id.* Because the State of Texas required that eighty-five percent of the Law School's 1992 entering class be Texas residents, the court found that inferior educational opportunity particularly affected the Law School's current pool of qualified resident minority applicants. *Id.* at B46, B23-24.

The district court further found that the pool of qualified resident minority applicants was artificially constricted not only by Texas' unconstitutional public school system, but also by the reputation of the University and the Law School as "white" institutions with an environment hostile to minorities. App. at B45. The court found that, despite extensive recruiting efforts, the Law School's legacy of discrimination has hindered efforts to attract qualified minority students. *Id.*

The district court also made extensive findings regarding the importance of diversity in institutions of higher learning. The district court found, and the court of appeals did not question, that grade point averages and LSAT scores do not "adequately reflect the qualifications and characteristics a law school should consider in developing a diverse student body, which provides substantial educational benefit for all members of a law school class." App. at B25. In fact, the ABA and American Association of Law Schools each requires commitment to diversity in the student body as a prerequisite for membership or accreditation. 18 Tr. 26-28; D387; D389; D391; D395. The district court reached its conclusion only after considering extensive testimony from deans of law schools across the country, from current and former law students, and from law professors.

REASONS FOR GRANTING THE WRIT

1. **This Court should correct the court of appeals' misperception that *Bakke* is no longer the law and should reaffirm that educational diversity remains a compelling interest that justifies individualized consideration of race, among other factors, in higher education admissions decisions.**

The two-judge majority held that it was unconstitutional for the Law School even to *consider* the race of individual applicants "for the purpose of obtaining a diverse student body," in flat violation of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).[6] The majority opinion maintained that, "in significant part," Justice Powell's opinion "was joined by no other justice," App. at A19; that "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of the majority of the Court in *Bakke* or any other case," App. at A23; and that "Justice Powell's view in *Bakke* is not binding precedent." *Id.*

But the court of appeals ignored the holding of five Justices, who joined in Part V-C of Justice Powell's opinion, that it was not impermissible for the University of California to consider race as a factor in making admissions decisions:

> In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

Bakke, 438 U.S. at 320 (opinion of the Court per Powell, J.); *id.* at 328 (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (joining in Part V-C of Justice Powell's opinion).

Exercise of this Court's certiorari jurisdiction would be amply warranted by a lower court's determination, under any circumstances, that a holding by this Court is no longer good law. *Bakke's* landmark status, and the paramount national interest in establishing, definitively, whether lower courts remain bound to follow it, represent further compelling reasons for this Court to review the decision below. For the last two decades, institutions of higher education have relied on *Bakke* to include race among the characteristics considered in composing student bodies that are not only bright, but diverse, to make education and the dialogue that advances it more effective and relevant to the society that graduates will enter. Longstanding and widespread reliance on *Bakke* counsel against its overruling, *see Planned Parenthood v. Casey*, 505 U.S. 833, 861-69 (1992), and particularly against permitting the lower courts simply to discard it.

Indeed, the Fifth Circuit itself recognized the important need for this Court's review and was able to declare *Bakke's* death only on the basis of concurring and dissenting opinions by the members of this Court and academic commentary.[7] In fact, however, the

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[6] Heeding this Court's admonition to the Fifth Circuit in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), Judge Weiner objected that "if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement." App. at A66 (Wiener, J., specially concurring).

[7] App. at A17-A33 (rejecting *Bakke* on the basis of five citations to Supreme Court majority opinions, four cites to plurality opinions, eleven cites to concurring opinions, three cites to dissenting opinions, eight cites to secondary authorities, and one cite to a lower court decision). Both the majority opinion and the concurrence in the Fifth Circuit stressed the urgent need for further guidance from this Court on the central issues in this case. *See, e.g., id.* at A17 n.18 (noting that *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), "the Supreme Court's most recent opinion on racial preferences — does not directly address the application of the strict scrutiny test"); *id.* at A34 n.39

(continued...)

Fifth Circuit's report of *Bakke's* demise was premature. The compelling interest in promoting educational diversity was recognized long before *Bakke*[8] and has been recognized even by those who reject diversity as a compelling interest in other contexts. Compare *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest") and *id.* at 288 n. (noting the difference between providing role models and "the very different goal of racial diversity among the faculty") with *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O'Connor, J. dissenting) (disagreeing with extending the interest in diversity to the award of broadcast licenses).

Diversity is an especially compelling interest in legal education. No other discipline deals so fundamentally with the ordering of human relationships in our society, including racial and ethnic minorities who have been subjected to discrimination:

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[7] (...continued)
("Unfortunately, the precise scope of allowable state action is of somewhat undefined contours."); *id.* at A69 ("Until further clarification issues from the Supreme Court defining 'compelling interest' (or telling us how to know one when we see one), I perceive no 'compelling' reason to rush in where the Supreme Court fears — or at least declines — to tread.") (Wiener, J., specially concurring).

[8] *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (one of "the four essential freedoms" of a university, necessary "to provide that atmosphere which is most conducive to speculation, experiment, and creation" is "to determine for itself on academic grounds . . . who may be admitted to study") (citations omitted); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("school authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements").

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts.

Sweatt v. Painter, 339 U.S. 629, 634 (1950); *see also Wygant*, 476 U.S. at 314-15 (Stevens, J., dissenting) (endorsing diversity rationale). The First Amendment dimension of educational policy choices, by State as well as private higher educational institutions, adds to the compelling nature of the diversity interest. *See Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (noting that "academic freedom" has "long . . . been viewed as a special concern of the First Amendment").

Whatever the status of *Bakke*, the issue should be decided by this Court, so that the same rule applies across the country. The question is so fundamental as to warrant resolution on a nationwide basis. The Law School, for its part, is now severely handicapped in competing with, say, Harvard, Stanford, or Michigan to attract top students and faculty, because it can no longer ensure a truly diverse student body. Minority students in Texas, Louisiana, and Mississippi may be given special consideration by colleges and universities on the east and west coasts, but not in their home states. This imbalance is as ironic as it is intolerable, given the long history of official discrimination in the education of minorities in these Gulf Coast states. *See, e.g.*, App. at B3-10; *United States v. Fordice*, 505 U.S. 717, 721-25 (1992); *United States v. Louisiana*, 692 F. Supp. 642, 644-46 (E.D. La. 1988).

2. **This Court should clarify what State education officials may consider as a "strong basis in the evidence" to conclude that individualized consideration of race is necessary to remedy the present effects of the State's own past discrimination in education.**

The district court chronicled Texas' history of official discrimination in the education of Blacks and Mexican Americans at all levels of the State system. App. at B3-10. The court carefully assessed the impact of this undisputed discrimination on the Law School, particularly in view of the state legislative mandate that eighty-five percent of the Law School's 1992 entering class (eighty percent today) be Texas residents. *Id* at B23-24 and n.33. The court found the ultimate effect stark and severe: in the absence of some attention to race, the 1992 entering class at the Law School would have included *at most* a handful of Blacks and Mexican Americans. These figures, chilling as they are, are overly optimistic, given the Law School's own history. "[T]he record in this case demonstrates that, without affirmative action, the perception of the law school as a 'white' institution would be exacerbated, which would compound the difficulties of attracting top minority students." *Id.* at B48.

Rejecting petitioners' remedial purpose, the court of appeals held that remedying the ongoing effects even of *de jure* discrimination can *never* be a compelling interest unless the only past discrimination that the remedy is designed to overcome is discrimination previously practiced by the governmental actor that installed and administered the remedy — in this case, the Law School itself. The justification for remedial action by the Law School thus cannot be augmented by findings of official discrimination by the State of Texas in primary and secondary education or in state higher education generally. "The Supreme Court . . . has limited the remedial interest to the harm wrought by a specific governmental unit." App. at A38 n.43.

In fact, this Court has never so severely restrained a state's ability to remedy the present effects of pervasive past discrimination in its own public education system. In *Richmond v.*

J.A. Croson Co., 488 U.S. 469 (1989), Justice O'Connor, joined by the Chief Justice and Justice White, squarely *rejected* the suggestion that a city was required to "limit any race-based remedial efforts to eradicating the effects of *its own* prior discrimination." *Id.* at 486 (emphasis added). Instead, the Justices took the broader view that a state or subdivision "has the authority to eradicate [even] the effects of *private* discrimination within its own legislative jurisdiction," *i.e.*, "within local commerce under its jurisdiction." *Id.* at 491-92 (emphasis added). "Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.* at 492.[9]

The State of Texas has been no mere "passive participant" in the past exclusion of Blacks and Mexican Americans from equal opportunity in public education. Even the court of appeals acknowledged that "Texas state actors have discriminated against some minorities in public schools" and that "lingering effects of such discrimination is [*sic*] not 'societal,' if that term is meant to exclude all state action." App. at A39. The court nevertheless concluded that recognizing any remedial interest in this case would allow "generalized assertions" of past discrimination, based on "amorphous claim[s]" and even "sheer speculation," to justify remedial efforts with "no logical stopping point" aimed at redressing societal discrimination. *Id.* at A36-37. This conclusion is refuted by the district court's extensive fact findings

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[9] *See also Johnson v. Transportation Agency*, 480 U.S. 616, 656 (1987) (O'Connor, J., concurring in the judgment) (gender may be used as a " 'plus' factor" in affirmative action plan on the basis of statistical imbalance in work force, even in the absence of a finding of actual discrimination); *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979) (recognizing that discrimination at one level of the job market may affect the qualified pool at another level); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (*per curiam*) (upholding Social Security benefit formula that generated higher payments for retired female wage-earners than for similarly situated men, in order to remedy prior wage discrimination in job markets).

demonstrating the close nexus between Texas' discrimination and the pool of residents from which the Law School was required to draw eighty-five percent of its students. *See, e.g., id.* at B46. ("many public schools in Texas continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s, the decades in which the majority of 1992 law school applicants attended primary and secondary schools.").

The court of appeals' reasoning conflicts with the decisions of other circuits recognizing that the extensive factual findings of a district court, especially when coupled with determinations like those by the Office for Civil Rights of the Department of Education and the district court in the *Adams* litigation, provide ample predicate for a race-conscious remedial program.[10] The Fifth Circuit's decision in this case also conflicts with *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), which upheld the consideration of race in admissions in a pre-professional program at the University of Tennessee.[11]

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[10] In *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), the court held:

> [T]he issue of whether the findings of past discrimination made by the District of Columbia District Court and HEW were adequate to justify a race-conscious remedy is not even close. Findings of previous statutory violations of title VI by a district court and OCR justify the use of some type of race-conscious remedy by a state to serve its constitutionally permissible objective of remedying past discrimination.
>
> 654 F.2d at 509.

[11] The Sixth Circuit held:

> Applicants do not arrive at the admissions office of a professional school in a vacuum. To be admitted, they ordinarily must have been students for sixteen years. . . .
>
> The consent decree in this case does not seek to remedy some amorphous "societal" wrong. It is directed solely at the continuing

Even though the State of Texas is the lead defendant in this case and the fountainhead of Texas' past *de jure* discrimination at all levels of public education,[12] the court of appeals held that, for the State to be considered the relevant governmental actor, "the State of Texas, through its *legislature*, would have to find that past discrimination has present effects . . . ." App. at A39 (emphasis added). In fact, the State of Texas, acting through its *governor*, effectively made such findings in agreeing to the higher education remedial program implemented in the Texas plans. *See* App. at B8. More fundamentally, the court of appeals' holding offended principles of federalism and state sovereignty insofar as it held that the State of Texas is not free to structure its system of governance for public education such that the governor, the boards of regents, and other state officials have some degree of flexibility in deciding for themselves that the lingering present effects on the Law School of *de jure* racial discrimination and segregation practiced largely at lower levels of the State's educational hierarchy are serious enough to require a race-conscious remedy in the Law School's own admissions policies. "'Congress need [not] make particularized findings in order to legislate.'" *United States v. Lopez*, 115 S.Ct. 1624, 1631 (1995) (citation omitted). Demanding that a State do so — and that it speak expressly and exclusively through its legislature — is unduly intrusive on the State's freedom, under Art. IV, § 4 (the Republican Form of Government

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> effects of past practices that adversely affected black[s] . . . as they moved through the public school systems and the higher education system of the state.
>
> *Id.* at 809-10.

[12] Until 1969 the Texas Constitution provided for the maintenance of "separate schools for the white and colored children." TEX. CONST. art. VII, § 7 (1876, repealed 1969). It was this fundamental law of the State of Texas, not the Law School's admissions requirements, that barred Heman Sweatt. *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App. — Austin 1948, writ ref'd), *rev'd*, 339 U.S. 629 (1950).

Clause) and the Tenth Amendment, to structure its decisionmaking authority as it sees fit.

In *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), this Court emphasized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 2117; *see also id.* at 2114 (distinguishing between a "No Trespassing" sign and a "welcome mat"). The record of this case fully demonstrates the Law School's remedial justification for considering race in its admissions decisions. This Court's review is amply warranted.

3. **This Court should clarify whether admissions officers in states having practiced *de jure* segregation may, consistent with *United States v. Fordice*, take race into account to ameliorate the present segregative effects of seemingly "race-neutral" admission standards.**

This is not just an affirmative action case; it is a desegregation case. Until the court of appeals' opinion, Texas higher education institutions, including the Law School, continued to operate under a series of desegregation plans originally mandated and monitored by OCR.

States have an especially compelling interest in remedying the effects of past discrimination in their own education systems. *Fordice*, 505 U.S. at 727-28; *see Croson*, 488 U.S. at 524 (Scalia, J., concurring) (distinguishing school desegregation cases from employment set-asides); *Hammon v. Barry*, 813 F.2d 412, 421 n.18 (D.C. Cir. 1987) (Starr, J.) (distinguishing employment set-asides from "the unique and sensitive area of education" and "the government's fundamental interest in education" that may "support the use of racial considerations"), *cert. denied*, 486 U.S. 1036 (1988). Indeed, states that operated officially segregated systems of higher education have a broad affirmative duty under both the Fourteenth Amendment and Title VI to dismantle those systems. *Fordice*, 505 U.S. at 727-28. That duty is not satisfied merely by

adopting race-neutral policies. Rather, the state must take affirmative steps to ameliorate practices and policies that perpetuate the dual system. *Id.* at 728. That constitutional duty may require a state either to eliminate, or to counteract and minimize to the extent possible, strict reliance on test scores that effectively segregate white and minority students. *Id.* at 737-38; *id.* at 744 (O'Connor, J., concurring).

Without consideration of race, the Law School would come perilously close to this Court's warning in *Fordice*. As the district court found:

> [T]he ultimate effect of abandoning affirmative action at the law school would be to redirect minorities to the historically separate state law school at Texas Southern University, thereby resegregating the law school.

App. at B47. TSU, which was created to avoid integrating The University of Texas and the Law School (and is still called "The House That Sweatt Built"), today enrolls over half of all minority law students in Texas. Its student body is nearly seventy-five percent minorities. The evidence was undisputed that if Texas is compelled to abandon any consideration of race at its state law schools, it will return to a starkly dual system of legal education. Few minorities would attend the historically white law schools, while seventy-seven percent of minority law students in Texas would attend TSU, whose student body would be eighty-five percent Blacks and Mexican Americans. 12 Tr. 44-45; D452; D453.

4. **This Court should settle whether, in view of *Seminole Tribe of Florida*, a federal court may entertain suit against a State without its consent under Title VI of the Civil Rights Act of 1964.**

Respondents brought suit under 42 U.S.C. §§ 1981 and 1983, and under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. In the district court, the State raised an Eleventh Amendment defense in its motion for summary judgment.[13] Although the district court's decision to deny both injunctive relief and compensatory damages made that jurisdictional objection less salient, it was error of the first constitutional magnitude for the court of appeals to proceed as though the Eleventh Amendment limit on federal court jurisdiction was "simply not before [it]." App. at A52 n.56. To the contrary, the court reversed the trial court's refusal to award compensatory damages and remanded with instructions that respondents were presumptively entitled to damages against the State defendants. *Id.* at A51.

As this Court squarely held in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1131 (1996), the Eleventh Amendment is a bar to the exercise of subject matter jurisdiction by the federal courts in suits brought by citizens of a State against that State. *See Hans v. Louisiana*, 134 U.S. 1 (1890). The court of appeals had no subject-matter jurisdiction to entertain an action against Texas and its officials in clear derogation of the protections of traditional sovereign immunity contained in the Eleventh Amendment.[14]

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[13] *See* Memorandum in Support of Defendants' Motion for Summary Judgment on the Issue of Standing, Aug. 13, 1993, at 28-33.

[14] Respondents' inclusion of additional questions presented, such as those going to the availability of damages and prospective relief, should in no way be construed as conceding the State's amenability to suit in the first instance.

Respondents' claims for damages are predicated solely on Title VI,[15] which this Court has already determined is a classic Spending Clause statute.[16] In light of *Seminole Tribe*, it is plain that Congress lacks constitutional authority simply to *abrogate* the State's Eleventh Amendment immunity pursuant to Article I, whether through mandatory legislation enacted under the Commerce Clause or through mandatory legislation enacted under the Spending Clause. *See id.*, 116 S.Ct. at 1126 (no "principled distinction" may be drawn between various Article I powers). The Spending Clause -- even more plainly than the Commerce Clause and in stark contrast to the Fourteenth Amendment's Section 5, which was "adopted well after the adoption of the Eleventh Amendment," *id.* at 1127 -- is not "a grant of authority to the Federal Government at the expense of the States." *Id.* at 1126. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 597 (1937)(Spending Clause, while permitting States to contract "with Congress if the essence of their statehood is maintained without impairment," does not thereby reduce state authority, for "[e]ven sovereigns may contract without derogating from their sovereignty").

State amenability to suit could be drawn only from Congress's 1986 amendment of Title VI to provide, in 42 U.S.C. § 2000d-7(a)(1), that a "State shall not be immune under the

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[15] It is established beyond challenge that § 1981 and § 1983 will not support an action seeking to override a State's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 340 (1979); *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989)("State is not a 'person' within the meaning of § 1983").

[16] *See Guardians Ass'n v. Civil Service Comm.*, 463 U.S. 582, 599 (1983)(White, J., joined by Rehnquist, J.)(quoting Sen. Humphrey and other proponents of the Act); *accord id.* at 636-38, 640 n.10 (Stevens, J., joined by Brennan and Blacksmun, JJ., dissenting)(five Justices indicated that Title VI was enacted solely pursuant to the Spending Clause); *see also United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6 (1979)(Title VI enacted solely "to assure federal funds would not be used in an improper manner").

Eleventh Amendment . . . from suit in Federal court for a violation of . . . Title VI of the Civil Rights Act of 1964 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." In enacting that provision, Congress sought by legislative dictate to override this Court's holding in *Guardians Ass'n, supra,* that limited Title VI remedies to prospective injunctive relief for unintentional violations of the Act. 463 U.S. at 602.

This assertion of federal legislative power to abrogate sovereign immunity cannot survive *Seminole Tribe*. This Court has now ruled that the provisions of Article I of the Constitution — necessarily including the Spending Clause — give Congress no power unilaterally to overcome the Eleventh Amendment: "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S.Ct. at 1131-32. Plainly, under this analysis, Title VI, which operates "not [as] a regulatory measure, but an exercise [under the Spending Clause] of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed,'" *Guardians Ass'n*, 463 U.S. at 599, is incapable of abrogating the Eleventh Amendment immunity of the States. The inescapable conclusion is that, when Congress sought in 1986 unilaterally to override state sovereign immunity, it was putting its power under the Spending Clause of Article I to a use that this Court has now definitively held impermissible.[17]

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[17] Nor is it even arguable that Title VI put the State of Texas on clear notice that, by allowing the Law School to accept Title VI funds, the State was somehow waiving its Eleventh Amendment immunity. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1980) (State must "voluntarily and knowingly accept" terms of waiver).

5. **This Court should settle whether *Carey v. Piphus* still requires plaintiffs to bear the ultimate burden of proving concrete injury before they may be awarded compensatory damages.**

The court of appeals recognized the "well-established rule . . . that in order to collect money damages, plaintiffs must prove that they have been injured." *Carey v. Piphus*, 435 U.S. 247,254-57 (1978). App. at A49. Nevertheless, the court held that, because respondents demonstrated a constitutional violation, under *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977), the burden shifted to petitioners to prove that respondents "would not have gained admittance to the law school under a race-blind system." *Id.* at A51. In so holding, the court of appeals recognized a split among the circuits on what *Mt. Healthy* means in racial preference cases, *id.* at A50 n.54.[18] It then proceeded to err in applying *Mt. Healthy*. This Court should settle whether *Mt. Healthy* relieves plaintiffs of the burden imposed by *Carey* to prove that the constitutional violation they claim caused the injury for which they seek compensation.

In *Carey*, this Court held that the common law of torts governs the award of compensatory damages in a § 1983 action. Thus, plaintiffs must prove not only that their constitutional rights were violated, but also that the violation caused the injury for which they seek compensation. 435 U.S. at 254-65. Absent proof

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[18] *Henson v. University of Ark.*, 519 F.2d 576, 577-78 (8th Cir. 1975) (per curiam) (placing burden of persuasion on white applicant to show affirmative action program prevented her admission) and *Martin v. Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318, 1345 (W.D.N.C. 1979) (holding that plaintiff in non-class action bears burden of proving damages) *with Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir. 1977) (*dictum*) (citing *Bakke* and *Mt. Healthy*, but finding no causation, as evidence showed that plaintiff would not have been admitted regardless of affirmation action), and *Heit v. Bugbee*, 494 F. Supp. 66, 66-67 (E.D. Mich. 1980) (adopting *Bakke* and *Mt. Healthy* reasoning *in toto* for firefighter's reverse discrimination claims), and *United States v. McDonald*, 553 F. Supp. 1003, 1006 (S.D. Tex. 1983) (*dictum*) (same for discriminatory criminal prosecution).

of concrete damages, only nominal damages may be awarded. *Id.* at 266-67.

The district court therefore correctly held that, "[b]ecause the plaintiffs have failed to establish that they would have been admitted under a constitutional system, they are not entitled to [compensatory] damages. Further, had the plaintiffs been entitled to damages, none of them established monetary damages as required under the law . . . ." App. at B69. Nothing in the trial or appellate record shows otherwise. A plaintiff showing a constitutional violation in the *process* applied to that plaintiff can "recover compensatory damages only if he prove[s] actual injury caused by the denial of his constitutional rights." *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 307 (1986).

The court of appeals erred in holding that *Mt. Healthy* and *Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977), placed on the State the burden to demonstrate plaintiffs' lack of injury once plaintiffs had shown a violation of the Constitution. To the contrary, in *Mt. Healthy*, this Court held only that, once a plaintiff proves that an impermissible consideration was a "substantial factor" in causing the plaintiff concrete injury (such as the loss of a job), the burden then shifts to the defendant to show that it would have reached the same decision in the absence of the constitutional violation. 429 U.S. at 287. Here, the consideration of race by the Law School in its admission decisions was *not* a "substantial factor" in the respondents' failure to gain admission.[19] The district court considered evidence that forty-two nonminority residents with statistical scores higher than or equal to respondents' were *denied* admission, and 151 nonminority residents with scores lower than or equal to respondents' were *offered* admission. P139. Accordingly, the burden never shifted to petitioners to show by a preponderance of the evidence that they would have reached the same decision on

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[19] Indeed, as the district court found, none of the respondents had proven that he or she would probably have been admitted even under "a strictly race-blind process." App. at B65 n.85.

respondents' applications in the absence of a consideration of race. *Mt. Healthy*, 429 U.S. at 287.

Indeed, the court of appeals' decision illustrates why *Mt. Healthy* should not be used as the court of appeals used it in cases involving race-conscious affirmative action. For the circuit court's decision has placed respondents in a better position than they would have occupied had the Law School never adopted an affirmative action plan at all, the very result *Mt. Healthy* was concerned to avoid. *See*, 429 U.S. at 285. The court of appeals has in effect *presumed* that respondents are entitled to admission simply because the Law School considered race in its admissions decisions, despite evidence of "non-race based weaknesses in [their] applications." App. at B62; D-338.

The mischief this error has created is momentous, even in the instant case. The court of appeals has now opened the courthouse doors to literally hundreds of frustrated white applicants, the vast majority of whom would not have been admitted even under a race-blind policy — all of them demanding substantial damages and/or instant admission to the Law School. The threat is not hypothetical.[20] The precedential implications for other cases are sweeping.

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[20] *See* Complaint at ¶ 21, *Malooly v. State of Texas et al.*, No. A 96CA 229 SS (W.D. Tex. Apr. 10, 1996) (class action for damages "on behalf of all white and non-preferred minority applicants to the Law School's 1994 entering class who were denied admission . . . ."); *see* Janet Elliott & Gordon Hunter, *Buying Time After Hopwood*, TEXAS LAWYER, March 25, 1996, at 1, 16 ("Plaintiffs' attorney Terrell Smith says the panel's shifting of the burden of proof to the law school is the key to the whole case and exposes the university to hundreds of other reverse discrimination suits.").

6. This Court should clarify the Article III limits on the power of a federal court to issue prospective relief.

A final respect in which the court of appeals' judgment warrants this Court's review arises from the Fifth Circuit's decision to award prospective relief, in the form of thinly-veiled judicial "directives" to the University of Texas, regarding the admissions policy for 1995-96 and beyond — a policy which was not before the court of appeals. The district court properly declined to issue such relief, and the Fifth Circuit's decision to award it raises grave questions under the "case" or "controversy" requirement of Article III.

Under *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983), and *Lujan v. Defenders of Wildlife Fed'n*, 504 U.S. 555, 560 (1992), there is no Article III case or controversy with respect to prospective relief here. For the aspect of the 1992 program invalidated by the district court has long since been discontinued and will not be reinstated. And, as to the *current* admissions policy, the first point to note is that the record is barren of support for the speculation that plaintiffs will reapply under it or be affected by it in any way.[21] Since make-whole relief would be available, if warranted, to each individual plaintiff in the form of an order of admission, there is no standing to seek prospective relief against the admissions policy as a whole. In order to claim the latter, plaintiffs would have to assert the rights of other, nonspecific potential parties who might be adversely affected by that policy in the future. This type of claim falls outside the case or controversy requirements of Article III.

A second and equally decisive Article III objection to prospective relief in this case is that, even if plaintiffs had

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[21] This case is thus readily distinguishable from *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), where this Court held that it was "very likely" that the company challenging the affirmative action policy at issue would in fact bid on a future contract under that policy, *id.* at 2105, and from *Northeastern Florida General Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993), where the company challenging a set-aside was "able and ready to bid on contracts" under a policy that maintained such a set-aside.

demonstrated a high likelihood that they would indeed reapply to the Law School, the record contains far too little information about the current admissions policy — the only policy that could affect them prospectively — to evaluate its concrete effect on their prospects. The record discloses what the new policy does *not* do: it does not use separate committees or statistical benchmarks for minorities. App. at B67 n.87. The new policy permits race to be considered only on an individualized basis, as one of many factors needed to produce diversity, and the percentage goals set by the Texas Plan for Blacks and Mexican Americans are purely aspirational.

The only "injury" respondents could suffer under the admissions program the Fifth Circuit halted — even assuming that they would reapply, which the record emphatically does *not* establish — would involve the individualized consideration of race as one of many factors. But mere *exposure* to such consideration of one's race, apart from any *effect* such consideration might have on one's concrete situation, would be the kind of diffuse, unparticularized "harm" that this Court has held does not suffice for purposes of Article III. *See, e.g., United States v. Hays*, 115 S.Ct. 2431, 2435-36 (1995).

There was accordingly no justification for the Fifth Circuit to address the constitutionality, in this prospective context, of the 1996 admissions process, or to issue elaborate "directives" to the Law School and other institutions, when the plaintiffs had not begun to satisfy the prerequisites for such intrusive equitable relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 30, 1996

Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*, *Petitioners*

vs.

CHERYL J. HOPWOOD, *et al.*, *Respondents*

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed March 18, 1996

No. 94-50569

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY
and
BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

DOUGLAS CARVELL, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY,

AND BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

No. 94-50664

CHERYL J. HOPWOOD, et al.,
Plaintiffs,

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

****

DOUGLAS CARVELL, et al.,
Plaintiffs,

DOUGLAS CARVELL,
Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

Before SMITH, WIENER and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

With the best of intentions, in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law ("the law school") discriminates in favor of those applicants by giving substantial racial preferences in its admissions program. The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities. The question we decide today in No. 94-50664 is whether the Fourteenth Amendment permits the school to discriminate in this way.

We hold that it does not. The law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body. "Racial preferences appear to 'even the score' ... only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment).

As a result of its diligent efforts in this case, the district court concluded that the law school may continue to impose racial preferences. See Hopwood v. Texas, 861 F.Supp. 551 (W.D.Tex.1994). In No. 94-50664, we reverse and remand, concluding that the law school may not use race as a factor in law school admissions. Further, we instruct the court to reconsider the issue of damages in accordance with the legal standards we now explain. In No. 94-50569, regarding the denial of intervention by two black student groups, we dismiss the appeal for want of jurisdiction.

I.

A.

The University of Texas School of Law is one of the nation's leading law schools, consistently ranking in the top twenty. See, e.g., America's Best Graduate Schools, U.S. NEWS & WORLD REPORT Mar. 20, 1995, at 84 (national survey ranking of seventeenth). Accordingly, admission to the law school is fiercely competitive, with over 4,000 applicants a year competing to be among the approximately 900 offered admission to achieve an entering class of about 500 students. Many of these applicants have some of the highest grades and test scores in the country.

Numbers are therefore paramount for admission. In the early 1990's, the law school largely based its initial admissions decisions upon an applicant's so- called Texas Index ("TI") number, a composite of undergraduate grade point average ("GPA") and Law School Aptitude Test ("LSAT") score.[1] The law school used this number as a matter of administrative convenience in order to rank candidates and to predict, roughly, one's probability of success in law school. Moreover, the law school relied heavily upon such numbers to estimate the number of offers of admission it needed to make in order to fill its first-year class.

Of course, the law school did not rely upon numbers alone. The admissions office necessarily exercised judgment in interpreting the individual scores of applicants, taking into consideration factors such as the strength of a student's undergraduate education, the difficulty of his major, and

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[1] The formulae were written by the Law School Data Assembly Service according to a prediction derived from the success of first-year students in preceding years. As the LSAT was determined to be a better predictor of success in law school, the formulae for the class entering in 1992 accorded an approximate 60% weight to LSAT scores and 40% to GPA.

The formula for students with a three-digit LSAT, see infra note 5, was calculated as: LSAT + (10) (GPA) = TI. For students with a two-digit LSAT, the formula was: (1.25) LSAT + (10) GPA = TI.

significant trends in his own grades and the undergraduate grades at his respective college (such as grade inflation). Admissions personnel also considered what qualities each applicant might bring to his law school class. Thus, the law school could consider an applicant's background, life experiences, and outlook. Not surprisingly, these hard-to-quantify factors were especially significant for marginal candidates.[2]

Because of the large number of applicants and potential admissions factors, the TI's administrative usefulness was its ability to sort candidates. For the class entering in 1992--the admissions group at issue in this case--the law school placed the typical applicant in one of three categories according to his TI scores: "presumptive admit," "presumptive deny," or a middle "discretionary zone." An applicant's TI category determined how extensive a review his application would receive.

Most, but not all, applicants in the presumptive admit category received offers of admission with little review. Professor Stanley Johanson, the Chairman of the Admissions Committee, or Dean Laquita Hamilton, the Assistant Dean for Admissions, reviewed these files and downgraded only five to ten percent to the discretionary zone because of weaknesses in their applications, generally a noncompetitive major or a weak undergraduate education.

Applicants in the presumptive denial category also received little consideration. Similarly, these files would be reviewed by one or two professors, who could upgrade them if

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[2] Notably, but of less significance to this appeal, residency also had a strong, if not often determinant, effect. Under Texas law in 1992, the law school was limited to a class of 15% non-residents, and the Board of Regents required an entering class of at least 500 students. The law school therefore had to monitor offers to non-residents carefully, in order not to exceed this quota, while at the same time maintaining an entering class of a manageable size.

they believed that the TI score did not adequately reflect potential to compete at the law school. Otherwise, the applicant was rejected.

Applications in the middle range were subjected to the most extensive scrutiny. For all applicants other than blacks and Mexican Americans, the files were bundled into stacks of thirty, which were given to admissions subcommittees consisting of three members of the full admissions committee. Each subcommittee member, in reviewing the thirty files, could cast a number of votes--typically from nine to eleven[3]--among the thirty files. Subject to the chairman's veto, if a candidate received two or three votes, he received an offer; if he garnered one vote, he was put on the waiting list; those with no votes were denied admission.

Blacks and Mexican Americans were treated differently from other candidates, however. First, compared to whites and non-preferred minorities[4] the TI ranges that were used to place

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[3] The number of votes would change over the course of the admissions season in order to achieve the appropriate number of offers.

[4] As blacks and Mexican Americans were the only two minority categories granted preferential treatment in admissions, it is inaccurate to say that the law school conducted separate admissions programs for "minorities" and "non-minorities." While the law school application form segregated racial and ethnic classification into seven categories--"Black/African American," "Native American," "Asian American," "Mexican American," "Other Hispanic" (meaning non-Mexican descent), "White," and "Other (describe)"--only American blacks and Mexican Americans received the benefit of the separate admissions track.

Thus, for example, the law school decided that a black citizen of Nigeria would not get preferential treatment, but a resident alien from Mexico, who resided in Texas, would. Likewise, Asians, American Indians, Americans from El Salvador and Cuba, and many others did not receive a preference.

It is important to keep the composition of these categories in mind. For the sake of simplicity and readability, however, we sometimes will refer to two broad categories: "whites" (meaning Texas residents who were whites

them into the three admissions categories were lowered to allow the law school to consider and admit more of them. In March 1992, for example, the presumptive TI admission score for resident whites and non-preferred minorities was 199.[5] Mexican Americans and blacks needed a TI of only 189 to be presumptively admitted.[6] The difference in the presumptive-deny ranges is even more striking. The presumptive denial score for "nonminorities" was 192; the same score for blacks and Mexican Americans was 179.

While these cold numbers may speak little to those unfamiliar with the pool of applicants, the results demonstrate that the difference in the two ranges was dramatic. According to the law school, 1992 resident white applicants had a mean GPA of 3.53 and an LSAT of 164. Mexican Americans scored 3.27 and 158; blacks scored 3.25 and 157. The category of "other minority" achieved a 3.56 and 160.[7]

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and non-preferred minorities) and "minorities" (meaning Mexican Americans and black Americans).

[5] Because of a recent change in the grading scale of the LSAT, the law school in 1992 had applicants who had taken an earlier LSAT scored on a 10- to-48 scale and others who had taken a later one scored on a 120-to-180 scale. Equivalence calculations were used to compare scores received on the two scales. For example, TI numbers of 199 (three-digit LSAT) and 87 (two-digit LSAT) were equivalent. For the sake of simplicity, we use three-digit numbers throughout this opinion.

[6] In March 1992, the resident Mexican American and black presumptive admit lines were in parity, but they had not started that way. The initial presumptive admit TI's were 196 for Mexican Americans and 192 for blacks. Thus, initially, blacks received preferential treatment over Mexican Americans by having a lower hurdle to cross to get into the discretionary zone. In March, Professor Johanson lowered the Mexican American TI in order to admit more of this group.

[7] The median scores of the 1992 class are as follows:

These disparate standards greatly affected a candidate's chance of admission. For example, by March 1992, because the presumptive denial score for whites was a TI of 192 or lower, and the presumptive admit TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be admitted, even though his score was considerably below[8] the level at which a white candidate almost certainly

Ethnicity	Resident	Nonresident
	GPA/LSAT	GPA/LSAT
All students	3.52/162	3.61/164
White	3.56/164	3.72/166
Black	3.30/158	3.30/156
Mexican American	3.24/157	3.38/174 *
Other minority	3.58/160	3.77/157

* Only two matriculated applicants.

In 1992, the LSAT's national distribution was approximately as follows:

LSAT	Percentile	2-Digit LSAT
166	94%	43
164	91%	41
162	88%	40
160	83%	39
158	78%	38
156	71%	36

On the basis of these percentiles, one-half of the law school's white resident matriculants were in the top 9% of all test-takers, one-half of the resident Mexican Americans were in approximateiy the top 25% of test- takers, and one-half of the resident blacks were in the top 22% of test- takers.

[8] To illustrate this difference, we consider the four plaintiffs in this case--Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers. For a student similarly situated to Hopwood, with a GPA of 3.8, to avoid

would be rejected. Out of the pool of resident applicants who fell within this range (189-192 inclusive), 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission.[9]

The stated purpose of this lowering of standards was to meet an "aspiration" of admitting a class consisting of 10% Mexican Americans and 5% blacks, proportions roughly comparable to the percentages of those races graduating from Texas colleges. The law school found meeting these "goals" difficult, however, because of uncertain acceptance rates and the variable quality of the applicant pool.[10] In 1992, for example, the entering class contained 41 blacks and 55 Mexican Americans, respectively 8% and 10.7% of the class.

In addition to maintaining separate presumptive TI levels for minorities and whites, the law school ran a segregated application evaluation process. Upon receiving an application form, the school color-coded it according to race. If a candidate failed to designate his race, he was presumed to be in a

presumptive denial as a white, i.e., to obtain a TI of 193 or above, her LSAT had to be at least a 155, a score in approximately the top 32% of test-takers. If she were black (thus, needing a 180 TI), she would have had to score a 142 on the LSAT, ranking her only in the top 80%. Likewise, a student similar to Carvell, who had a 3.28 GPA, would have needed a "white" LSAT of 160 (top 17%) and a "black" 147 (top 63%). A student like Rodgers with a 3.13 would have needed either a 162 (top 12%) as a white or 149 as a black (top 56%). Finally, a student like Elliott with a 2.98 GPA would have needed a 163 (top 10%) or 150 (top 53%), respectively.

[9] According to the plaintiffs, 600-700 higher-scoring white residents were passed over before the first blacks were denied admission. There is no specific finding on this assertion, and though the law school does not appear to refute it, we do not rely upon it in making our decision.

[10] Thus, the law school constantly had to adjust its TI range over the course of the admissions season to reach a desired mix. See supra note 6.

nonpreferential category. Thus, race was always an overt part of the review of any applicant's file.

The law school reviewed minority candidates within the applicable discretionary range differently from whites. Instead of being evaluated and compared by one of the various discretionary zone subcommittees, black and Mexican American applicants' files were reviewed by a minority subcommittee of three, which would meet and discuss every minority candidate. Thus, each of these candidates' files could get extensive review and discussion. And while the minority subcommittee reported summaries of files to the admissions committee as a whole, the minority subcommittee's decisions were "virtually final."

Finally, the law school maintained segregated waiting lists, dividing applicants by race and residence. Thus, even many of those minority applicants who were not admitted could be set aside in "minority-only" waiting lists. Such separate lists apparently helped the law school maintain a pool of potentially acceptable, but marginal, minority candidates.[11]

B.

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers (the "plaintiffs") applied for admission to the 1992 entering law school class. All four were white residents of Texas and were rejected.

The plaintiffs were considered as discretionary zone candidates.[12] Hopwood, with a GPA of 3.8 and an LSAT of 39 (equivalent to a three-digit LSAT of 160), had a TI of 199, a

[11] The district court did not find, nor is the record clear on, how these different classes of waiting list candidates were compared in the event the law school made last-minute admissions decisions. The record does show that the school carefully monitored the race of applicants in filling the last openings in late spring and early summer.

[12] The district court discussed in detail the plaintiffs' qualifications and their rejections. See 861 F.Supp. at 564-67.

score barely within the presumptive-admit category for resident whites, which was 199 and up. She was dropped into the discretionary zone for resident whites (193 to 198), however, because Johanson decided her educational background overstated the strength of her GPA. Carvell, Elliott, and Rogers had TI's of 197, at the top end of that discretionary zone. Their applications were reviewed by admissions subcommittees, and each received one or no vote.

II.

The plaintiffs sued primarily under the Equal Protection Clause of the Fourteenth Amendment; they also claimed derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("title VI").[13] The plaintiffs' central claim is that they were subjected to unconstitutional racial discrimination by the law school's evaluation of their admissions applications. They sought injunctive and declaratory relief and compensatory and punitive damages.

After a bench trial, the district court held that the school had violated the plaintiffs' equal protection rights. 861 F.Supp. at 579. The plaintiffs' victory was pyrrhic at best, however, as the court refused to enjoin the law school from using race in admissions decisions or to grant damages beyond a one-dollar nominal award to each plaintiff. The district court, however, did grant declaratory relief and ordered that the plaintiffs be allowed to apply again without paying the requisite fee. Id. at 583.

[13] The defendants are the State of Texas; the University of Texas Board of Regents; the members of the board, named but sued in their official capacities; the University of Texas at Austin; the President of the university, sued in his official capacity; the University of Texas School of Law; the dean of the law school, sued in his official capacity; and the Chairman of the Admissions Committee, sued in his official capacity.

The district court began by recognizing the proper constitutional standard under which to evaluate the admissions program: strict scrutiny. Id. at 568. As it was undisputed that the school had treated applicants disparately based upon the color of their skin, the court asked whether the law school process (1) served a compelling government interest and (2) was narrowly tailored to the achievement of that goal. Under the first prong of the test, the court held that two of the law school's five proffered reasons met constitutional muster: (1) "obtaining the educational benefits that flow from a racially and ethnically diverse student body" and (2) "the objective of overcoming past effects of discrimination." Id. at 571.

Significantly, on the second justification, the court rejected the plaintiffs' argument that the analysis of past discrimination should be limited to that of the law school; instead, the court held that the State of Texas's "institutions of higher education are inextricably linked to the primary and secondary schools in the system." Id.[14] Accordingly, the court found that Texas's long history of racially discriminatory practices in its primary and secondary schools in its not-too-distant past had the following present effects at UT law: "the law school's lingering reputation in the minority community, particularly with prospective students, as a 'white' school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities." Id. at 572. The court also noted that "were the Court to limit its review to the University of Texas, the Court would still find a 'strong evidentiary basis for concluding that remedial action is necessary.'" Id. (citation omitted).

The court next evaluated whether the Texas program was narrowly tailored to further these goals. Id. at 573. Applying a four-factor test devised by the Supreme Court, the court held

[14] Because of this conclusion, the district court examined at length the history of race relations in Texas and discrimination in its schools. 861 F.Supp. at 554-57.

only part of the 1992 admissions scheme unconstitutional. Those parts that gave minorities a "plus," that is, the component of the admissions program that treated candidates' TI scores differently based upon race, was upheld. Id. at 578.

The court held, however, that differential treatment was not allowed where candidates of different races were not compared at some point in the admission process. Thus, the court struck down the school's use of separate admissions committees for applications in the discretionary zone, id. at 578-79, and in dictum speculated that presumptive denial lines would not pass muster, as many white candidates would get no review, while similarly situated minorities would, id. at 576 n. 71.

Though it declared that the law school's 1992 admissions program violated the plaintiffs' equal protection rights, the court granted little relief. First, the court did not order that the plaintiffs be admitted to the law school. Instead, it used what it saw as analogous title VII caselaw on burden-shifting to hold that while the state had committed a constitutional violation, the plaintiffs had the ultimate burden of proving damages. Id. at 579-80. The court then found that the defendants had proffered a legitimate, non- discriminatory reason for denying the plaintiffs admission and that the plaintiffs had not met their burden of showing that they would have been admitted but for the unlawful system. Id. at 582.

Moreover, the court held that the plaintiffs were not entitled to prospective injunctive relief, because "of the law school's voluntary change to a procedure, which on paper and from the testimony, appears to remedy the defects the Court has found in the 1992 procedure." Id.[15] To pass muster under the court's reasoning, the law school simply had to have one committee that at one time during the process reviewed all applications and did not establish separate TI numbers to define

[15] Shortly before trial, apparently in response to the filing of this lawsuit, the law school modified its 1992 admissions practices to fit the district court's view of the proper constitutional system. See id. at 582 n. 87.

the presumptive denial categories. In other words, if the law school applied the same academic standards, but had commingled the minority review in the discretionary zone with the review of whites, its program would not have been struck down. The same admissions result would occur, but the process would be "fair." Id.

Finally, the court determined that the only appropriate relief was a declaratory judgment and an order allowing the plaintiffs to reapply to the school without charge. Id. at 582-83. No compensatory or punitive damages, the court reasoned, could be awarded where the plaintiffs had proven no harm. Moreover, the court reasoned that as the law school had promised to change its admissions program by abandoning the two-committee system, no prospective injunctive relief was justified.

III.

The central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." Shaw v. Reno, 509 U.S. 630, ----, 113 S.Ct. 2816, 2824 (1993) (citing Washington v. Davis, 426 U.S. 229, 239 (1976)). It seeks ultimately to render the issue of race irrelevant in governmental decisionmaking. See Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination.") (footnote omitted).

Accordingly, discrimination based upon race is highly suspect. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and "racial discriminations are in most circumstances irrelevant and therefore prohibited...." Hirabayashi v. United States, 320 U.S. 81, 100 (1943). Hence, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); see also Loving v. Virginia, 388 U.S.

1, 11 (1967); Brown v. Board of Educ., 347 U.S. 483, 493-94. These equal protection maxims apply to all races. Adarand Constructors v. Pena, 115 S.Ct. 2097, 2111, 132 L.Ed.2d 158 (1995).

In order to preserve these principles, the Supreme Court recently has required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny. See, e.g., id. at 2113; Loving, 388 U.S. at 11. Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny[16] when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial."[17]

Strict scrutiny is necessary because the mere labeling of a classification by the government as "benign" or "remedial" is meaningless. As Justice O'Connor indicated in Croson:

> Absent searching judicial inquiry into the justifications for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or

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[16] In their initial brief on appeal, the defendants argued that intermediate scrutiny is appropriate here. In a supplemental brief filed to address the subsequent opinion in Adarand, they now acknowledge that strict scrutiny is the appropriate test.

[17] Adarand, 115 S.Ct. at 2112-13 (overruling Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990), insofar as it applied intermediate scrutiny to congressionally mandated "benign" racial classifications); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"); id. at 520 (Scalia, J., concurring in judgment); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to government discrimination.").

> simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493 (plurality opinion).

Under the strict scrutiny analysis, we ask two questions: (1) Does the racial classification serve a compelling government interest, and (2) is it narrowly tailored to the achievement of that goal? Adarand, 115 S.Ct. at 2111, 2117. As the Adarand Court emphasized, strict scrutiny ensures that "courts will consistently give racial classifications ... detailed examination both as to ends and as to means." Id.[18]

Finally, when evaluating the proffered governmental interest for the specific racial classification, to decide whether the program in question narrowly achieves that interest, we must recognize that "the rights created by ... the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Shelley v. Kraemer, 334

[18] While Adarand--the Supreme Court's most recent opinion on racial preferences--does not directly address the application of the strict scrutiny test, it underscores the presumptive unconstitutionality of racial classifications. "By requiring strict scrutiny of racial classifications, we require courts to make sure that a government classification based on race, which 'so seldom provide[s] a relevant basis for disparate treatment,' Fullilove [v. Klutznick, 448 U.S. 448, 534, 100 S.Ct. 2758, 2803, 65 L.Ed.2d 902 (1980)], (Stevens, J., dissenting), is legitimate, before permitting unequal treatment based on race." --- U.S. at ----, 115 S.Ct. at 2113.

U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948).[19] Thus, the Court consistently has rejected arguments conferring benefits on a person based solely upon his membership in a specific class of persons.[20]

With these general principles of equal protection in mind, we turn to the specific issue of whether the law school's consideration of race as a factor in admissions violates the Equal Protection Clause. The district court found both a compelling remedial and a non-remedial justification for the practice.

First, the court approved of the non-remedial goal of having a diverse student body, reasoning that "obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications." 861 F.Supp. at 571. Second, the court determined that the use of racial classifications could be justified as a remedy for the "present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole." Id. at 573.

A.

1.

Justice Powell's separate opinion in Bakke provided the original impetus for recognizing diversity as a compelling state interest in higher education. In that case, Allan Bakke, a white

[19] See also Adarand, id. at ----, 115 S.Ct. at 2111 ("[A]ny person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

[20] See, e.g., Croson, 488 U.S. at 498-500, 109 S.Ct. at 724-25 (holding that past societal discrimination against a group confers no basis for local governments to provide a specifically tailored remedy to current members of that group); Wygant, 476 U.S. at 275-76, 106 S.Ct. at 1847- 48 (rejecting argument that governmental discrimination in teacher layoffs is allowed to foster role models within a group).

male, was denied admission to the Medical School of the University of California at Davis, a state-run institution. Claiming that the State had discriminated against him impermissibly because it operated two separate admissions programs for the medical school, he brought suit under the state constitution, title VI, and the Equal Protection Clause.

Under the medical school's admissions system, the white applicants, who comprised the majority of the prospective students, applied through the general admissions program. A special admissions program was reserved for members of "minority groups" or groups designated as "economically and/or educationally disadvantaged." The university set aside sixteen of the one hundred positions in the entering class for candidates from the special program.

The California Supreme Court struck down the program on equal protection grounds, enjoined any consideration of race in the admissions process, and ordered that Bakke be admitted. The United States Supreme Court affirmed in part and reversed in part in an opinion announced by Justice Powell. 438 U.S. at 271-72 (opinion of Powell, J.). The Court reached no consensus on a justification for its result, however. Six Justices filed opinions, none of which garnered more than four votes (including the writer's). The two major opinions--one four-Justice opinion by Justices Brennan, White, Marshall, and Blackmun and one by Justice Stevens in which Chief Justice Burger and Justices Stewart and Rehnquist joined--reflected completely contrary views of the law.

While Justice Powell found the program unconstitutional under the Equal Protection Clause and affirmed Bakke's admission, Justice Stevens declined to reach the constitutional issue and upheld Bakke's admission under title VI. Justice Powell also concluded that the California Supreme Court's proscription of the consideration of race in admissions could not be sustained. This became the judgment of the Court, as the four-Justice opinion by Justice Brennan opined that racial classifications designed to serve remedial purposes should

receive only intermediate scrutiny. These Justices would have upheld the admissions program under this intermediate scrutiny, as it served the substantial and benign purpose of remedying past societal discrimination.

Hence, Justice Powell's opinion has appeared to represent the "swing vote," and though, in significant part, see id. at 272 n. *,it was joined by no other Justice, it has played a prominent role in subsequent debates concerning the impact of Bakke.[21] In the present case, the significance of Justice Powell's opinion is its discussion of compelling state interests under the Equal Protection Clause. See id. at 305-15. 2 Specifically, after Justice Powell recognized that the proper level of review for racial classifications is strict scrutiny, id. at 305-06, he rejected and accepted respective justifications for the school's program as "substantial enough to support the use of a suspect classification," id. at 306.

Notably, because the first step in reviewing an affirmative action program is a determination of the state's interests at stake,[22] it often is the determinative step. Justice Powell outlined the four state interests proffered by the Bakke defendants:

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[21] See, e.g., Vincent Blasi, Bakke as Precedent: Does Mr. Justice Powell Have a Theory?, 67 CAL.L.REV. 21, 24 (1979) (arguing that Bakke's precedential force is governed by the common conclusions of Justices Powell and Stevens, though it is erroneous to conclude that Powell's opinion has "controlling significance on all questions"); Robert G. Dixon, Jr., Bakke: A Constitutional Analysis, 67 CAL.L.REV. 69 (1979) (Justice Powell's "tiebreaking opinion ... has acquired wide pragmatic appeal.").

[22] As affirmative action programs are by definition purposeful classifications by race, they do not present the problem of governmental action that is facially neutral but has a disparate impact and is motivated by race. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

> The special admissions program purports to serve the purposes of: (I) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Id. at 305-06 (emphasis added, citation and footnote omitted).

Justice Powell reasoned that the second and third justifications--remedying societal discrimination and providing role models--were never appropriate.[23] He determined that any remedial justification was limited to eliminating "identified discrimination" with "disabling effects." Id. at 307 (citing the school desegregation cases). He specifically emphasized that a particularized finding of a constitutional or statutory violation must be present before a remedy is justified. He determined not only that such findings were not present in Bakke, but that the medical school was not even in a position to make such findings. Id. at 309.

Justice Powell further reasoned that diversity is a sufficient justification for limited racial classification. Id. at 311-16. "[The attainment of a diverse student body] clearly is a constitutionally permissible goal for an institution of higher education." Id. at 311. He argued that diversity of minorities' viewpoints furthered "academic freedom," an interest under the Constitution. While acknowledging that "academic freedom" does not appear as a constitutional right, he argued that it had

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[23] The Supreme Court subsequently has agreed with that position. See Wygant, 476 U.S. at 274-76, 106 S.Ct. at 1847-48 (plurality opinion). The district court a quo erred in suggesting that societal discrimination is constitutionally cognizable. See 861 F.Supp. at 570 n. 56, 571 n. 60.

"long ... been viewed as a special concern of the First Amendment." Id. at 312.[24]

Justice Powell presented this "special concern" as in tension with the Fourteenth Amendment. "Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,' petitioner invokes a countervailing constitutional interest, that of the First Amendment." Id. at 313.[25] The Justice then concluded that

> [a]n otherwise qualified medical student with a particular background-- whether it be ethnic, geographic, culturally advantaged or disadvantaged--may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

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[24] See also Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (recognizing four separate components of "academic freedom").

[25] Saying that a university has a First Amendment interest in this context is somewhat troubling. Both the medical school in Bakke and, in our case, the law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens.

Significantly, Sweezy involved a person who was called before the Attorney General of New Hampshire to answer for alleged subversive activities. He declined on First Amendment grounds to answer questions about a lecture he had delivered at the University of New Hampshire. While Justice Frankfurter spoke of a university's interest in openness and free inquiry, it was plainly through the First Amendment rights of individual scholars. 354 U.S. at 262, 266-67, 77 S.Ct. at 1217-18, 1219-20 (Frankfurter, J., concurring in result).

Id. at 314 (footnote omitted). Justice Powell therefore approved of a consideration of ethnicity as "one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." Id.

The next step for Justice Powell was to decide whether the medical school's program was necessary to further the goal of diversity. He said it was not. As the program made race the only determining factor for a certain number of the open spots that had been set aside, it did not further full diversity but only a conception of that term limited to race.

Justice Powell speculated that a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet does not insulate the individual from comparison with all the other candidates for the available seats," might pass muster. Id. at 317. The Justice did not define what he meant by a "plus," but he did write that a "plus" program would be one in which an

> applicant who loses out to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would only mean that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of another applicant. His qualifications would have been weighted fairly and competitively, and he would have no basis to complaint of unequal treatment under the Fourteenth Amendment.

Id. at 318.

Under this conception of the Fourteenth Amendment, a program that considered a host of factors that include race would be constitutional, even if an applicant's race "tipped the scales" among qualified applicants. What a school could not do is to refuse to compare applicants of different races or establish a

strict quota on the basis of race. In sum, Justice Powell found the school's program to be an unconstitutional "quota" system, but he intimated that the Constitution would allow schools to continue to use race in a wide-ranging manner.

2.

Here, the plaintiffs argue that diversity is not a compelling governmental interest under superseding Supreme Court precedent. Instead, they believe that the Court finally has recognized that only the remedial use of race is compelling. In the alternative, the plaintiffs assert that the district court misapplied Justice Powell's Bakke standard, as the law school program here uses race as a strong determinant rather than a mere "plus" factor and, in any case, the preference is not narrowly applied. The law school maintains, on the other hand, that Justice Powell's formulation in Bakke is law and must be followed--at least in the context of higher education.

We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in Bakke garnered only his own vote and has never represented the view of a majority of the Court in Bakke or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.

Justice Powell's view in Bakke is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In Bakke, the word "diversity" is mentioned nowhere except in Justice Powell's single-Justice opinion. In fact, the four-Justice opinion, which would have upheld the special admissions program under intermediate scrutiny, implicitly rejected Justice Powell's position. See 438 U.S. at 326 n. 1

(Brennan, White, Marshall, and Blackmun JJ., concurring in the judgment in part and dissenting) ("We also agree with Mr. Justice POWELL that a plan like the "Harvard" plan ... is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.") (emphasis added). Justice Stevens declined to discuss the constitutional issue. See id. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body. As the Adarand Court states, the Bakke Court did not express a majority view and is questionable as binding precedent. 115 S.Ct. at 2109 ("The Court's failure in Bakke ... left unresolved the proper analysis for remedial race-based government action.").

Since Bakke, the Court has accepted the diversity rationale only once in its cases dealing with race. Significantly, however, in that case, Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 564-65 (1990), the five-Justice majority relied upon an intermediate scrutiny standard of review to uphold the federal program seeking diversity in the ownership of broadcasting facilities. In Adarand,, 115 S.Ct. at 2112-13, the Court squarely rejected intermediate scrutiny as the standard of review for racial classifications, and Metro Broadcasting is now specifically overruled to the extent that it was in conflict with this holding. Id. at 2113. No case since Bakke has accepted diversity as a compelling state interest under a strict scrutiny analysis.

Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs. In Croson, 488 U.S. at 493 (plurality opinion), the Court flatly stated that "[u]nless [racial classifications] are strictly reserved for remedial settings, they

may in fact promote notions of racial inferiority and lead to a politics of racial hostility." (emphasis added).[26]

Justice O'Connor, in her Adarand-vindicated dissent in Metro Broadcasting, joined by Justices Rehnquist, Scalia, and Kennedy, explained this position:

> Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.

497 U.S. at 612 (O'Connor, J., dissenting). Indeed, the majority in Metro Broadcasting had not claimed otherwise and decided only that such an interest was "important." Justice Thomas, who joined the Court after Metro Broadcasting was decided, roundly condemned "benign" discrimination in his

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[26] See also Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 422 (7th Cir.) ("The whole point of Croson is that disadvantage, diversity, or other grounds favoring minorities will not justify governmental racial discrimination ...; only a purpose of remedying discrimination against minorities will do so.") (emphasis added), cert. denied, 500 U.S. 954 (1991).

Notably, Justice Scalia rejected the use of racial classifications "in order (in a broad sense) 'to ameliorate the effects of past discrimination.' " Croson, 488 U.S. at 520 (Scalia, J., concurring in the judgment) (quoting Croson, 488 U.S. at 476-77). He, however, suggested one other possible compelling state interest: a social emergency. He opined that "where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb" will justify racial classifications. Croson, 488 U.S. at 521 (Scalia, J., concurring in judgment). While such an interest is probably consistent with the widely criticized holdings of Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), plainly such an interest is not presented in this case.

recent Adarand opinion, in which he suggests that the diversity rationale is inadequate to meet strict scrutiny. See Adarand, 115 S.Ct. at 2119 (Thomas, J., concurring in part and concurring in judgment).[27]

In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in Bakke, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.

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[27] The law school places much reliance upon Justice O'Connor's concurrence in Wygant for the proposition that Justice Powell's Bakke formulation is still viable. In her 1986 Wygant opinion, in the context of discussing Justice Powell's opinion, Justice O'Connor noted that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment).

The law school's argument is not persuasive. Justice O'Connor's statement is purely descriptive and did not purport to express her approval or disapproval of diversity as a compelling interest. Her subsequent statements outlined above in Croson and Metro Broadcasting suggest strongly that reliance upon this statement in Wygant is unjustified.

Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race. See, e.g., Croson, 488 U.S. at 496 (plurality opinion); Bakke, 438 U.S. at 307 (opinion of Powell, J.).

Accordingly, we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would contravene precedent that we are not authorized to challenge.

While the use of race per se is proscribed, state-supported schools may reasonably consider a host of factors--some of which may have some correlation with race--in making admissions decisions. The federal courts have no warrant to intrude on those executive and legislative judgments unless the distinctions intrude on specific provisions of federal law or the Constitution.

A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.[28]

For this reason, race often is said to be justified in the diversity context, not on its own terms, but as a proxy for other characteristics that institutions of higher education value but that

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[28] The law school's admissions program makes no distinction among black and Mexican American applicants in an effort to determine which of them, for example, may have been culturally or educationally disadvantaged.

do not raise similar constitutional concerns.[29] Unfortunately, this approach simply replicates the very harm that the Fourteenth Amendment was designed to eliminate.

The assumption is that a certain individual possesses characteristics by virtue of being a member of a certain racial group. This assumption, however, does not withstand scrutiny. "[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Richard A. Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 SUP.CT.REV. 12 (1974).

To believe that a person's race controls his point of view is to stereotype him. The Supreme Court, however, "has remarked a number of times, in slightly different contexts, that it is incorrect and legally inappropriate to impute to women and minorities 'a different attitude about such issues as the federal budget, school prayer, voting, and foreign relations.' " Michael S. Paulsen, Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion, 71 TEX.L.REV. 993, 1000 (1993) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 627-28 (1984)). "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." Metro Broadcasting, 497 U.S. at 602 (O'Connor, J., dissenting).[30]

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[29] For example, Justice Powell apparently felt that persons with different ethnic backgrounds would bring diverse "experiences, outlooks, and ideas" to the medical school. Bakke, 438 U.S. at 314 (opinion of Powell, J.).

[30] Thus, to put it simply, under the Equal Protection Clause

Instead, individuals, with their own conceptions of life, further diversity of viewpoint. Plaintiff Hopwood is a fair example of an applicant with a unique background. She is the now-thirty-two-year-old wife of a member of the Armed Forces stationed in San Antonio and, more significantly, is raising a severely handicapped child. Her circumstance would bring a different perspective to the law school. The school might consider this an advantage to her in the application process, or it could decide that her family situation would be too much of a burden on her academic performance.

We do not opine on which way the law school should weigh Hopwood's qualifications; we only observe that "diversity" can take many forms. To foster such diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.[31]

> the distribution of benefits and costs by government on racial or ethnic grounds is impermissible. Even though it is frequently efficient to sort people by race or ethnic origin, because racial or ethnic identity may be a good proxy for functional classifications, efficiency is rejected as a basis for governmental action in this context.

Posner, supra, at 22.

[31] We recognize that the use of some factors such as economic or educational background of one's parents may be somewhat correlated with race. This correlation, however, will not render the use of the factor unconstitutional if it is not adopted for the purpose of discriminating on the basis of race. See McCleskey v. Kemp, 481 U.S. 279 (1987). As Justice O'Connor indicated in Hernandez v. New York, 500 U.S. 352 (1991), which was a challenge under Batson v. Kentucky, 476 U.S. 79 (1986), based upon the prosecution's strike of potential jurors who spoke Spanish:

> No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not

The Court also has recognized that government's use of racial classifications serves to stigmatize. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954) (observing that classification on the basis of race "generates a feeling of inferiority"). While one might argue that the stigmatization resulting from so-called "benign" racial classifications is not as harmful as that arising from invidious ones,[32] the current Court has now retreated from the idea that so-called benign and invidious classifications may be distinguished.[33] As the plurality

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> sufficient to constitute an equal protection violation, and intentional discrimination, which is.

500 U.S. at 375 (O'Connor, J., joined by Scalia, J., concurring in the judgment).

[32] According to one of the four-Justice opinions in Bakke, racial classifications stigmatize when "they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separation." 438 U.S. at 357-58 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). In Bakke, however, these Justices rejected strict scrutiny because the program at issue could not be said to stigmatize as did other racial classifications. These Justices nevertheless recognized that rational-basis scrutiny would not be enough. Id. at 361 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

[33] As Judge Posner has indicated,

> the proper constitutional principle is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens.... To ask whether racial exclusion may not have overriding benefits for both races in particular circumstances is to place the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and thereby free the judge to enact his personal values into constitutional doctrine.

Posner, supra, at 25-26.

in Croson warned, "[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility." 488 U.S. at 493.[34]

Finally, the use of race to achieve diversity undercuts the ultimate goal of the Fourteenth Amendment: the end of racially-motivated state action. Justice Powell's conception of race as a "plus" factor would allow race always to be a potential factor in admissions decisionmaking. While Justice Blackmun recognized the tension inherent in using race-conscious remedies to achieve a race-neutral society, he nevertheless accepted it as necessary. Bakke, 438 U.S. at 405. Several Justices who, unlike Justices Powell and Blackmun, are still on the Court, have now

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[34] See also Adarand, 115 S.Ct. at 2119 (Thomas, J., concurring in part and concurring in judgment) ("But there can be no doubt that racial paternalism and its unintended consequences may be as poisonous and pernicious as any other form of discrimination."). One prominent constitutional commentator specifically has noted that where programs involve lower and separate standards of selection, "a new badge of implied inferiority, assigned as an incident of governmental noblesse oblige," results.

> Explicit in state, local, or federal plans using separate and lower standards by race is a statement by government that certain persons identified by race are in fact being placed in positions they may be presumed not likely to hold but for their race (because they are presumed to be unable to meet standards the government itself requires to be met). The message from government is written very large when these plans proliferate: a

double (and softer) standard for admission, a double (and softer) standard for hiring, a double (and softer) standard for promotion, a double (and softer) standard for competitive bidding, and so on. Without question, this is a systematic racial tagging by government--a communication to others that the race of the individual they deal with bespeaks a race- related probability, created solely by the government itself, of lesser qualification than others holding equivalent positions.

William Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U.CHI.L.REV. 775, 787 n. 38 (1979).

renounced toleration of this tension, however. See Croson, 488 U.S. at 495 (plurality opinion of O'Connor, J.) ("The dissent's watered down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from government decisionmaking such irrelevant factors as a human being's race ... will never be achieved.") (quoting Wygant, 476 U.S. at 320 (Stevens, J., dissenting)).[35]

In sum, the use of race to achieve a diverse student body, whether as a proxy for permissible characteristics, simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.[36] These latter factors may, in fact, turn out to

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[35] As professor Van Alstyne has argued:

> Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life--or in the life or practices of one's government--the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

Van Alstyne, supra note 34, at 809-10.

[36] Because we have determined that any consideration of race by the law school is constitutionally impermissible if justified by diversity, it is not necessary to determine whether, as plaintiffs argue, the admissions system under which the plaintiffs applied operated as a de facto "quota" system similar to the one struck down in Bakke. We do note that even if a "plus" system were permissible, it likely would be impossible to maintain such a system without degeneration into nothing more than a "quota" program. See Bakke, 438 U.S. at 378 ("For purposes of constitutional adjudication, there is no difference between [setting aside a certain number of places for minorities and using minority status as a positive factor].") (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, in this case, the law school appeared to be

be substantially correlated with race, but the key is that race itself not be taken into account. Thus, that portion of the district court's opinion upholding the diversity rationale is reversibly flawed.[37]

B.

We now turn to the district court's determination that "the remedial purpose of the law school's affirmative action program is a compelling government objective." 861 F.Supp. at 573. The plaintiffs argue that the court erred by finding that the law school could employ racial criteria to remedy the present effects of past discrimination in Texas's primary and secondary schools. The plaintiffs contend that the proper unit for analysis is the law school, and the state has shown no recognizable present effects of the law school's past discrimination. The law school, in response, notes Texas's well- documented history of discrimination in education and argues that its effects continue today at the law school, both in the level of educational attainment of the average minority applicant and in the school's reputation.

In contrast to its approach to the diversity rationale, a majority of the Supreme Court has held that a state actor may racially classify where it has a "strong basis in the evidence for its conclusion that remedial action was necessary." Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277 (plurality opinion)). Generally, "[i]n order to justify an affirmative action program, the State must show there are 'present effects of past

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especially adept at meeting its yearly "goals." See Hopwood, 861 F.Supp. at 574 n. 67.

[37] Plaintiffs additionally have argued that the law school's program was not narrowly tailored in the diversity context because (1) it failed to award preferences to non-Mexican Hispanic Americans, Asian Americans, American Indians, or other minorities, and (2) it failed to accord as much weight to non-racial diversity factors, such as religion and socioeconomic background, as it did to race.

discrimination.' " Hopwood v. Texas ("Hopwood I "),[38] 21 F.3d 603, 605 (5th Cir.1994) (per curiam) (quoting Podberesky v. Kirwan, 956 F.2d 52, 57 (4th Cir.1992), cert. denied, 115 S.Ct. 2001 (1995)); see also Wygant, 476 U.S. at 280, 106 S.Ct. at 1850 (opining that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account") (opinion of Powell, J.).[39]

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[38] Hopwood I is the first appeal of the intervention issue that we address infra.

[39] Unfortunately, the precise scope of allowable state action is of somewhat undefined contours. Indeed, it is not evident whether permitted remedial action extends to the "present effects of past discrimination." This language, derived from Justice Brennan's opinion in Bakke, 438 U.S. at 362-66, appears intended to present little resistance to wide-ranging affirmative action plans.

While Justice Brennan began by stating that schools have a duty affirmatively to erase the vestiges of their past discriminatory practices, he compared this duty to the power of Congress to enforce § 1 of the Fourteenth Amendment through § 5. He reasoned that under that wide-ranging power, the beneficiaries of such a program need not present proof that they were discriminated against; a showing that they were in the general class was sufficient. Id. at 363-64. Nor would a school need judicial findings of past discrimination. Id. at 364. Finally, he argued that such beneficiaries would not even have to show that that school had a history of past discrimination, but need only suggest that they were the victims of general societal discrimination that prevented them from being otherwise qualified to enter the school. Id. at 365-66. Hence, under this standard, almost any school could adopt an affirmative action plan.

There is no question, however, that subsequent Supreme Court opinions, notably Wygant and Croson, have rejected broad state programs that purport to be remedial and that, presumably, would have satisfied Justice Brennan's standard for meeting the "present effects of past discrimination." And some members of the Court would limit any remedial purpose to the actual victims of discrimination. See Adarand, 115 S.Ct. at 2118 (Scalia, J., concurring in part and concurring in judgment) ("[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."). Nevertheless, we will not eschew use of the phrase "present effects of past

Because a state does not have a compelling state interest in remedying the present effects of past societal discrimination, however, we must examine the district court's legal determination that the relevant governmental entity is the system of education within the state as a whole. Moreover, we also must review the court's identification of what types of present effects of past discrimination, if proven, would be sufficient under strict scrutiny review. Finally, where the state actor puts forth a remedial justification for its racial classifications, the district court must make a "factual determination" as to whether remedial action is necessary. Wygant, 476 U.S. at 277-78. We review such factual rulings for clear error.

1.

The Supreme Court has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." Wygant, 476 U.S. at 274 (plurality opinion of Powell, J.) (citing Hazelwood School Dist. v. United States, 433 U.S. 299 (1977)).[40] In Wygant, the Court analyzed a collective bargaining agreement between a school board and a teacher's union that allowed the board to give minorities preferential treatment in the event of layoffs. A plurality rejected the theory that such a program was justified because it provided minority role models. Id. at 274-77 (plurality

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discrimination," as we used this language in Hopwood I, 21 F.3d at 605, and another circuit did so in Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir.1994), cert. denied, 115 S.Ct. 2001 (1995). We will, however, limit its application in accordance with Wygant and Croson.

[40] See Wygant, 476 U.S. at 286, 106 S.Ct. at 1853 (opinion of O'Connor, J., concurring in part and concurring in judgment) ("The Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant remedial use of a carefully constructed affirmative action program.").

opinion). Such a claim was based upon remedying "societal discrimination," a rationale the Court consistently has rejected as a basis for affirmative action. Accordingly, the state's use of remedial racial classifications is limited to the harm caused by a specific state actor.[41]

Moreover, the plurality in Wygant held that before a state actor properly could implement such a plan, it "must ensure that ... it has convincing evidence that remedial action is warranted." Id. at 277. Accord id. at 289 (O'Connor, J., concurring in part and concurring in judgment). The plurality felt that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Id. at 276.

The Croson Court further discussed how to identify the relevant past discriminator. Writing for the Court, Justice O'Connor struck down a minority business set-aside program implemented by the City of Richmond and justified on remedial grounds. While the district court opined that sufficient evidence had been found by the city to believe that such a program was necessary to remedy the present effects of past discrimination in the construction industry, the Court held:

> Like the "role model" theory employed in Wygant, a generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' Wygant, 476 U.S. at 275 (plurality opinion). 'Relief' for such an ill-defined wrong could extend until the percentage of public

[41] See also id. at 288 (O'Connor, J., concurring in part and concurring in judgment) ("I agree with the plurality that a government agency's interest in remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.").

> contracts awarded to [minority businesses] in Richmond mirrored the percentage of minorities in the population as a whole.

488 U.S. at 498.[42] The Court refused to accept indicia of past discrimination in anything but "the Richmond construction industry." Id. at 505.

In addition, in a passage of particular significance to the instant case, the Court analogized the employment contractor situation to that of higher education and noted that "[l]ike claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." Id. at 499. Such claims were based upon "sheer speculation" about how many minorities would be in the contracting business absent past discrimination. Id.

Applying the teachings of Croson and Wygant, we conclude that the district court erred in expanding the remedial justification to reach all public education within the State of Texas. The Supreme Court repeatedly has warned that the use of racial remedies must be carefully limited, and a remedy reaching all education within a state addresses a putative injury that is vague and amorphous. It has "no logical stopping point." Wygant, 476 U.S. at 275 (plurality opinion).

The district court's holding employs no viable limiting principle. If a state can "remedy" the present effects of past discrimination in its primary and secondary schools, it also would be allowed to award broad-based preferences in hiring, government contracts, licensing, and any other state activity that in some way is affected by the educational attainment of the applicants. This very argument was made in Croson and rejected:

[42] Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy in this portion of the opinion.

> The "evidence" relied upon by the dissent, history of school desegregation in Richmond and numerous congressional reports, does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by the dissent could justify a preference of any size or duration.

488 U.S. at 505. The defendants' argument here is equally expansive.[43]

Strict scrutiny is meant to ensure that the purpose of a racial preference is remedial. Yet when one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope of the harm--and the appropriate reach of the remedy--is called into question. The school desegregation cases, for example, concentrate on school districts--singular government units--and the use of interdistrict remedies is strictly limited. See Missouri v. Jenkins, 115 S.Ct. 2038, 2048, (1995); Milliken v. Bradley, 418 U.S. 717, 745, (1974) ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."). Thus, one justification for limiting the remedial powers of a state actor is that the specific agency involved is best able to measure the harm of its past discrimination.

Here, however, the law school has no comparative advantage in measuring the present effects of discrimination in

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[43] The fact that the plaintiffs named the State of Texas as one defendant does not mean that it is proper to scrutinize the state as the relevant past discriminator. This argument confuses a theory of liability with a justification for a limited racial remedy. The State of Texas simply may be responsible for the wrongs of the law school, which is a governmental entity the state has created. The Supreme Court, however, has limited the remedial interest to the harm wrought by a specific governmental unit.

primary and secondary schools in Texas. Such a task becomes even more improbable where, as here, benefits are conferred on students who attended out-of-state or private schools for such education. Such boundless "remedies" raise a constitutional concern beyond mere competence. In this situation, an inference is raised that the program was the result of racial social engineering rather a desire to implement a remedy.

No one disputes that in the past, Texas state actors have discriminated against some minorities in public schools. In this sense, some lingering effects of such discrimination is not "societal," if that term is meant to exclude all state action. But the very program at issue here shows how remedying such past wrongs may be expanded beyond any reasonable limits.

Even if, arguendo, the state is the proper government unit to scrutinize, the law school's admissions program would not withstand our review. For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm. A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny. Obviously, none of those predicates has been satisfied here.

We further reject the proposition that the University of Texas System, rather than the law school, is the appropriate governmental unit for measuring a constitutional remedy. The law school operates as a functionally separate unit within the system. As with all law schools, it maintains its own separate admissions program. The law school hires faculty members that meet the unique requirements of a law school and has its own deans for administrative purposes. Thus, for much the same reason that we rejected the educational system as the proper measure--generally ensuring that the legally-imposed racially discriminatory program is remedial--we conclude that the

University of Texas System is itself too expansive an entity to scrutinize for past discrimination.[44]

In sum, for purposes of determining whether the law school's admissions system properly can act as a remedy for the present effects of past discrimination, we must identify the law school as the relevant alleged past discriminator. The fact that the law school ultimately may be subject to the directives of others, such as the board of regents, the university president, or the legislature, does not change the fact that the relevant putative discriminator in this case is still the law school. In order for any of these entities to direct a racial preference program at the law school, it must be because of past wrongs at that school.

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[44] And again, any such remedy here would be grossly speculative. As the defendants concede and the district court found, there is no recent history of overt sanctioned discrimination at the University of Texas. Hopwood, 861 F.Supp. at 572. Nor does the record even suggest such discrimination at any of the other component schools of the University of Texas System. Thus, any harm caused to the students of those institutions would be the result of the present effects of past discrimination.

We do note that the law school is not autonomous. In Texas, the management of higher education has been divided by the legislature into different "systems." See 12 TEX.JUR.3D, Colleges and Universities § 2 (1993). The University of Texas at Austin, with which the law school is associated, is part of the University of Texas System. TEX.EDUC.CODE ANN. §§ 67.01 to 67.62 (West 1991). Accordingly, the legislature, which has ultimate control over the school, has delegated its "management and control" to the regents of the University of Texas System. Id. § 67.02. Thus, the law school is governed by both the legislature and the university's board of regents.

Yet, while the state's higher authorities may have the power to require the law school to remedy its past wrongs, they may do so consistently with the Constitution only if the remedial actions are directed at the law school. This requirement is what the Supreme Court dictated by limiting the remedial purpose to the "governmental unit involved." Wygant, 476 U.S. at 274 (plurality opinion).

Next, the relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue:

> To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program.

Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir.1994), cert. denied, 115 S.Ct. 2001 (1995). Moreover, as part of showing that the alleged present effects of past discrimination in fact justify the racial preference program at issue, the law school must show that it adopted the program specifically to remedy the identified present effects of the past discrimination.

Here, according to the district court: "The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities." 861 F.Supp. at 572. Plaintiffs now argue that these three alleged effects are at most examples of societal discrimination, which the Supreme Court has found not to be a valid remedial basis. "The effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of a type that justifies the program." Podberesky, 38 F.3d at 154.

As a legal matter, the district court erred in concluding that the first and third effects it identified--bad reputation and hostile environment-- were sufficient to sustain the use of race in the admissions process. The Fourth Circuit examined similar arguments in Podberesky, a recent case that struck down the use of race-based scholarships. The university in that case sought,

in part, to justify a separate scholarship program based solely upon race because of the university's "poor reputation within the African-American community" and because "the atmosphere on campus [was] perceived as being hostile to African-American students." Id. at 152.

The Podberesky court rejected the notion that either of these rationales could support the single-race scholarship program. The court reasoned that any poor reputation by the school "is tied solely to knowledge of the University's discrimination before it admitted African-American students." Id. at 154. The court found that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this." Id.

We concur in the Fourth Circuit's observation that knowledge of historical fact simply cannot justify current racial classifications. Even if, as the defendants argue, the law school may have a bad reputation in the minority community, "[t]he case against race-based preferences does not rest on the sterile assumption that American society is untouched or unaffected by the tragic oppression of its past." Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1079 (4th Cir.1993). "Rather, it is the very enormity of that tragedy that lends resolve to the desire to never repeat it, and find a legal order in which distinctions based on race shall have no place." Id. Moreover, we note that the law school's argument is even weaker than that of the university in Podberesky, as there is no dispute that the law school has never had an admissions policy that excluded Mexican Americans on the basis of race.

The Podberesky court rejected the hostile-environment claims by observing that the "effects"--that is, racial tensions--were the result of present societal discrimination. 38 F.3d at 155. There was simply no showing of action by the university that contributed to any racial tension. Similarly, one cannot conclude that the law school's past discrimination has created

any current hostile environment for minorities. While the school once did practice de jure discrimination in denying admission to blacks, the Court in Sweatt v. Painter, 339 U.S. 629 (1950), struck down the law school's program. Any other discrimination by the law school ended in the 1960's. Hopwood, 861 F.Supp. at 555.

By the late 1960's, the school had implemented its first program designed to recruit minorities, id. at 557, and it now engages in an extensive minority recruiting program that includes a significant amount of scholarship money. The vast majority of the faculty, staff, and students at the law school had absolutely nothing to do with any discrimination that the law school practiced in the past.

In such a case, one cannot conclude that a hostile environment is the present effect of past discrimination. Any racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions.

Even if the law school's alleged current lingering reputation in the minority community--and the perception that the school is a hostile environment for minorities--were considered to be the present effects of past discrimination, rather than the result of societal discrimination, they could not constitute compelling state interests justifying the use of racial classifications in admissions. A bad reputation within the minority community is alleviated not by the consideration of race in admissions, but by school action designed directly to enhance its reputation in that community.

Minority students who are aided by the law school's racial preferences have already made the decision to apply, despite the reputation. And, while prior knowledge that they will get a "plus" might make potential minorities more likely to apply, such an inducement does nothing, per se, to change any

hostile environment. As we have noted, racial preferences, if anything, can compound the problem of a hostile environment.[45]

The law school wisely concentrates only on the second effect the district court identified: underrepresentation of minorities because of past discrimination. The law school argues that we should consider the prior discrimination by the State of Texas and its educational system rather than of the law school. The school contends that this prior discrimination by the state had a direct effect on the educational attainment of the pool of minority applicants and that the discriminatory admissions program was implemented partially to discharge the school's duty of eliminating the vestiges of past segregation.

As we have noted, the district court accepted the law school's argument that past discrimination on the part of the Texas school system (including primary and secondary schools), reaching back perhaps as far as the education of the parents of today's students, justifies the current use of racial classifications.[46] No one disputes that Texas has a history of

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[45] The testimony of several minority students underscores this point. They stated generally that they felt that other students did not respect them because the other students assumed that minorities attained admission because of the racial preference program.

[46] The argument is that because the state discriminated in its primary and secondary school systems, the students' educational attainment was adversely affected, and this harm extended to their higher education, thus justifying giving current applicants a "plus" based on race. This reasoning is especially important in justifying benefits for Mexican Americans, as there is no evidence that the law school implemented de jure (or even de facto) discrimination against this group in its admissions process. Because this logic ignores the relevant actions in this case, i.e., discrimination by the law school, it is not necessary for us to examine the potential causational flaws in the argument.

Moreover, if we did find that the past wrongs of Texas school districts were the sort of discrimination that the law school could address, the school still would have to prove the present effects of that past wrong. Without some strong evidence in the record showing that today's law school

racial discrimination in education. We have already discussed, however, that the Croson Court unequivocally restricted the proper scope of the remedial interest to the state actor that had previously discriminated. 488 U.S. at 499. The district court squarely found that "[i]n recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas." 861 F.Supp. at 572. As a result, past discrimination in education, other than at the law school, cannot justify the present consideration of race in law school admissions.

The law school now attempts to circumvent this result by claiming that its racial preference program is really a "State of Texas" plan rather than a law school program. Under the law school's reading of the facts, its program was the direct result of the state's negotiations with what was then the United States Department of Health, Education and Welfare's Office for Civil Rights ("OCR"). To bring the Texas public higher education system into compliance with title VI, the state adopted the so-called "Texas Plan."

In light of our preceding discussion on the relevant governmental unit, this argument is inapposite. Even if the law school were specifically ordered to adopt a racial preference program, its implementation at the law school would have to meet the requirements of strict scrutiny.[47]

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applicants still bear the mark of those past systems, such effects seem grossly speculative. The district court simply assumed that "[t]his segregation has handicapped the educational achievement of many minorities...." 861 F.Supp. at 573. And we would still have to ask whether the program was narrowly tailored to this goal.

[47] To the extent that the OCR has required actions that conflict with the Constitution, the directives cannot stand. The Supreme Court has addressed required state compliance with federal law in the voting rights context. Miller v. Johnson, 115 S.Ct. 2475, 2491 (1995) ("As we suggested in Shaw [v. Reno, 113 S.Ct. 2816, 2830-31 (1993)], compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading

Moreover, these alleged actions in the 1980's are largely irrelevant for purposes of this appeal. There is no indication that the Texas Plan imposed a direct obligation upon the law school. To the contrary, the law school's admissions program was self-initiated. Moreover, the current admissions program was formulated primarily in the 1990's, and the district court did not hold otherwise. See 861 F.Supp. at 557 ("Against this historical backdrop [including Texas's dealing with the OCR], the law school's commitment to affirmative action in the admissions process evolved."). Thus it is no more correct to say that the State of Texas implemented the program at issue than it is to assert that the Commonwealth of Virginia, not the City of Richmond, was responsible for the minority set-aside program in Croson.

The district court also sought to find a remedial justification for the use of race and, at the same time, attempted to distinguish Croson using United States v. Fordice, 505 U.S. 717 (1992). The court held that the law school had a compelling interest to "desegregate" the school through affirmative action.

The reliance upon Fordice is misplaced, however. The district court held that Fordice's mandate to schools "to eliminate every vestige of racial segregation and discrimination" made Croson inapplicable, 861 F.Supp. at 571, and reasoned that this mandate includes the effects of such prior practices or policies.

Fordice does not overrule Croson. The central holding of Fordice is that a state or one of its subdivisions must act to repudiate the continuing "policies or practices" of discrimination. 505 U.S. at 731-32.[48] In other words, a state

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and application of those laws.") (emphasis added).

[48] In more detail, the Fordice Court said the following:

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects--whether by

has an affirmative duty to remove policies, tied to the past, by which it continues to discriminate. The Fordice Court did not address, in any way, a state actor's duty to counter the present effects of past discrimination that it did not cause.[49]

In sum, the law school has failed to show a compelling state interest in remedying the present effects of past discrimination sufficient to maintain the use of race in its admissions system. Accordingly, it is unnecessary for us to examine the district court's determination that the law school's admissions program was not narrowly tailored to meet the compelling interests that the district court erroneously perceived.[50]

> influencing student enrollment or by fostering segregation in other facets of the university system--and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

505 U.S. at 731.

[49] In Croson, Justice O'Connor did argue that a state may act to prevent its powers from being used to support private discrimination. 488 U.S. at 491-92 (plurality opinion) ("[A] state or local subdivision, (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.") (emphasis added). Hence, a specific state actor can act to prevent the state from being used as a "passive participant" in private discrimination. This power does not create wide- ranging authority to remedy societal discrimination, however.

[50] The plaintiffs argue that indeed there is no narrow tailoring, for at least the following reasons: (1) In 1992, more than two-thirds of all admission offers to blacks, and a majority of all blacks who matriculated, involved out-of-state residents, thus undercutting the law school's stated purpose of remedying past discrimination in Texas. (2) The system of preferences has no termination date, thus indicating that there is no connection between the plan and a bona fide remedial purpose. (3) Preference is given even to blacks and Mexican Americans who graduated

IV.

While the district court declared the admissions program unconstitutional, it granted the plaintiffs only limited relief. They had requested injunctive relief ordering that they be admitted to law school, compensatory and punitive damages, and prospective injunctive relief preventing the school from using race as a factor in admissions.

A.

We must decide who bears the burden of proof on the damages issue. The district court refused to order the plaintiffs' admission (or award any compensatory damages), as it found that they had not met their burden of persuasion in attempting to show that they would have been admitted absent the

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from private secondary schools and thus did not suffer from state-ordered racial discrimination.

The law school apparently chose admission goals of 5% blacks and 10% Mexican Americans because those are the respective percentages of college graduates in Texas who are black and Mexican American. Nothing in the record, however, establishes any probative correlation between the degree of past discrimination and the percentage of students from a minority group who graduate from college.

There is no history either of de jure discrimination against Mexican Americans in education at any level in Texas or of de facto discrimination against Mexican Americans by the law school. Therefore, it is puzzling that the law school would set an admissions goal for Mexican Americans that is twice that of blacks, as to whom the history of de jure discrimination in Texas Education in general, and by the law school in particular, is irrefutable.

If fashioning a remedy for past discrimination is the goal, one would intuit that the minority group that has experienced the most discrimination would have the lowest college graduation rate and therefore would be entitled to the most benefit from the designed remedy. The goals established by the law school are precisely the reverse of that intuitive expectation and are more reflective of a goal of diversity (which we hold is not compelling) than of a goal of remedying past discrimination.

unconstitutional system. 861 F.Supp. at 579-82.[51] The law school now argues that the plaintiffs had the burden of persuasion on the issue of damages and that the district court's findings are not clearly erroneous.[52] The plaintiffs maintain, as they did in the district court, that once they had shown a constitutional violation, the burden of persuasion shifted to the school to show that the denial of admission was not caused by that violation.

The well-established rule is that in order to collect money damages, plaintiffs must prove that they have been injured. Carey v. Piphus, 435 U.S. 247, 254-57 (1978). Several Supreme Court cases, however, allow for a transfer of burden upon proof of discrimination. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977); City of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).[53]

In Mt. Healthy, a discharged school teacher sued for reinstatement, claiming his termination was a result of comments he had made on a radio show, a violation of his First and Fourteenth Amendment rights. The Court devised a test of "causation" that placed the burden of proving no harm on the defendant:

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[51] This finding also affected the court's analysis in denying prospective relief and compensatory damages.

[52] The district court applied a burden-shifting scheme similar to the methodology used in the title VII context. 861 F.Supp. at 579-80 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)). The law school concedes that the burden-shifting exercise was unnecessary, but it maintains nonetheless that the "ultimate burden of proof," including proof of damages, rests upon the plaintiffs. See id.

[53] Some of Justice Powell's dicta in Bakke also squarely supports the plaintiffs' claim that once discrimination is proved, the defendant bears the burden of proving no damage. Bakke, 438 U.S. at 320 (opinion of Powell, J.).

> Initially, ... the burden was properly placed upon the respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to the respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287. In Arlington Heights, the Court applied a similar rule where the decision of a zoning board was challenged as racially discriminatory. See 429 U.S. at 270 n. 21. In sum, these cases allow a defendant, who intended to discriminate or otherwise act unconstitutionally, to show that its action would have occurred regardless of that intent.

Courts are split on whether the Mt. Healthy rubric applies in racial preference cases.[54] We conclude that the Mt. Healthy methodology is appropriate in the instant case. The Mt.

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[54] Compare Henson v. University of Ark., 519 F.2d 576, 577-78 (8th Cir.1975) (per curiam) (placing burden of persuasion on white applicant to show affirmative action program prevented her admission) and Martin v. Charlotte-Mecklenburg Bd. of Educ., 475 F.Supp. 1318, 1345 (W.D.N.C.1979) (holding that plaintiff in non-class action bears burden of proving damages) with Donnelly v. Boston College, 558 F.2d 634, 635 (1st Cir.1977) (dictum) (citing Bakke and Mt. Healthy, but finding no causation, as evidence showed that plaintiff would not have been admitted regardless of affirmative action) and Heit v. Bugbee, 494 F.Supp. 66, 66-67 (E.D.Mich.1980) (adopting Bakke and Mt. Healthy reasoning in toto for firefighter's reverse discrimination claims) and United States v. McDonald, 553 F.Supp. 1003, 1006 (S.D.Tex.1983) (dictum) (same for discriminatory criminal prosecution).

Healthy plaintiff, like the present plaintiffs, brought a constitutional challenge, and his injuries were analogous to the injuries alleged here. As we have said, the title VII burden-shifting scheme is designed to determine whether a violation of law has occurred.

In this case, there is no question that a constitutional violation has occurred (as the district court found) and that the plaintiffs were harmed thereby. See Adarand, 115 S.Ct. at 2105 ("The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' ") (citation omitted). The Mt. Healthy burden-shifting exercise simply gives the defendant law school a second chance of prevailing by showing that the violation was largely harmless.

As the district court held, to the contrary, that plaintiffs had the burden, it should revisit this issue in light of what we have said in both the liability and remedial portions of this opinion.[55] In the event that the law school is unable to show (by a preponderance of the evidence) that a respective plaintiff would not have been admitted to the law school under a constitutional admissions system, the court is to award to that plaintiff any equitable and/or monetary relief it deems appropriate.

Obviously, if the school proves that a plaintiff would not have gained admittance to the law school under a race-blind system, that plaintiff would not be entitled to an injunction admitting him to the school. On the other hand, the law school's inability to establish a plaintiff's non-admission--if that occurs on remand--opens a panoply of potential relief, depending

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[55] The district court concluded that the plaintiffs proved only that they had been denied equal treatment but had failed to "prove an injury-in-fact." 861 F.Supp. at 582. To the extent that the court felt that plaintiffs failed to show injury-in-fact because they failed to prove that they would have been admitted under a constitutional admissions system, this conclusion should be revisited on remand, where the district court must apply the proper burden and redetermine whether plaintiffs would have been admitted.

in part upon what course that plaintiff's career has taken since trial in mid-1994. It then would be up to the district court, in its able discretion, to decide whether money damages[56] can substitute for an order of immediate admission--relief that would ring hollow for a plaintiff for whom an education at the law school now is of little or no benefit.[57]

Additionally, the district court erred in holding that plaintiffs did not prove that defendants had committed intentional discrimination under title VI. "Intentional discrimination," as used in this context, means that a plaintiff must prove "that the governmental actor, in adopting or employing the challenged practices or undertaking the challenged action, intended to treat similarly situated persons differently on the basis of race." Castaneda v. Pickard, 648 F.2d 989, 1000 (5th Cir. Unit A June 1981); see also Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). While we agree with the district court's conclusion that the various defendants acted in good faith, there

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[56] We do not opine on any Eleventh Amendment immunity in this case. See, e.g., United Carolina Bank v. Board of Regents, 665 F.2d 553, 561 (5th Cir. Unit A 1982) (holding that the Eleventh Amendment barred a civil rights suit brought by a professor against university officials in their official capacities). This issue is simply not before us.

[57] For example, if the school is unable to show that plaintiff Carvell would not have gained admission even under a constitutional admissions system, he may be entitled to be compensated for the difference, to which he testified, between tuition at the law school and tuition at Southern Methodist University School of Law, which he attended instead. The district court should also consider the following paradox: The law school argued strenuously that plaintiff Elliott did not have standing to sue, as he had been offered admission to the school--albeit at the last moment--and had failed to accept that offer. The district court found that this offer of admission had not been communicated to Elliott. 861 F.Supp. at 566. In considering damages, however, the court held that "in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process." Id. at 581. The district court should re-examine these contradictory results.

is no question that they intended to treat the plaintiffs differently on account of their race.

B.

The plaintiffs argue that, because they proved a constitutional violation, and further violations were likely to result, the district court erred in denying them prospective injunctive relief. We review denials of this sort of relief for an abuse of discretion. See, e.g., Peaches Entertainment Corp. v. Entertainment Repertoire, 62 F.3d 690, 693 (5th Cir.1995). The law school avers that the district court was well within its equitable discretion in denying relief, especially as the school had abandoned the practices that the district court had found were unconstitutional--to-wit, the use of separate admissions committees for whites and minorities.

We review denials of prospective injunctive relief as we would any other denial of permanent injunctive relief under FED.R.CIV.P. 65, keeping in mind, however, the questions of mootness, ripeness, and standing. See generally 11A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed. 1995). That treatise notes that

> [p]erhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion. Of course, in some situations the facts and relevant law may indicate that an injunction clearly should be granted or denied. However, in most cases the determination whether to issue an injunction involves a balancing of interests of the parties who might be affected by the court's decision--the hardship on the plaintiff if relief is denied as compared to the defendant if relief is granted and the extent to which the latter hardship can be mitigated by requiring a security

> bond. Not surprisingly, therefore, the court's decision depends on the circumstances of each case.

Id. at 41-42. Accordingly, the usual practice upon reversal of a denial of injunctive relief is to remand for a reweighing of the equities. Id. § 2962, at 448; See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 354-55 (5th Cir.1977). In other situations, the appellate court may order the district court to enter an injunction. See, e.g., Southeastern Promotions, Ltd. v. City of Mobile, 457 F.2d 340 (5th Cir.1972).

According to the district court, the school had abandoned the admissions procedure--consisting of the separate minority subcommittee--that was used in 1992, 1993, and 1994. The court reasoned that, as a new procedure was developed for 1995, a prospective injunction against the school was inappropriate. We conclude, however, that, while the district court may have been correct in deciding that the new procedure eliminates the constitutional flaws that the district court identified in the 1992 system, there is no indication that the new system will cure the additional constitutional defects we now have explained.

The new system utilizes a small "administrative admissions group" and does not use presumptive admission and denial scores. See Hopwood, 861 F.Supp. at 582 n. 87. Most significantly, there is no indication that in employing the new plan, the law school will cease to consider race per se in making its admissions decisions. To the contrary, as the district court recognized, the law school continues to assert that overt racial preferences are necessary to the attainment of its goals. See Hopwood, 861 F.Supp. at 573-75.

The district court has already granted some equitable relief: It directed that the plaintiffs be permitted to re-apply to the law school without incurring further administrative costs. In accordance with this opinion, the plaintiffs are entitled to apply under a system of admissions that will not discriminate against anyone on the basis of race. Moreover, the plaintiffs have

shown that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.

It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.

C.

The plaintiffs contend that the district court's application of the wrong standard causes it to deny punitive damages. The plaintiffs aver that the court applied an animus standard, when it should have asked whether the school acted with "reckless indifference" to their constitutional rights. They ask for a remand on this issue.

It is not apparent, from the record, what standard the district court applied in considering the punitive damages issue. The court did determine, however, that the law school had always acted in good faith. This is a difficult area of the law, in which the law school erred with the best of intentions. As a result, the plaintiffs have not met the federal standard for punitive damages as stated in Smith v. Wade, 461 U.S. 30, 56 (1983). Thus, we agree with the district court that punitive damages are not warranted. We note, however, that if the law school continues to operate a disguised or overt racial classification system in the future, its actors could be subject to actual and punitive damages.

V.

Consolidated with the appeal of the merits issues of this appeal is No. 94- 50569, challenging the district court's denial of a motion to intervene. The proposed intervenors--the Thurgood Marshall Legal Society and the Black Pre-Law Association (the "associations")--ask this court, for the second time, for the right to intervene. On their first attempt, the associations moved to intervene prior to trial either as of right or by permission. The district court denied intervention, and we affirmed. See Hopwood v. Texas, 21 F.3d 603 (5th Cir.1994) (per curiam) ("Hopwood I ").

Now, following the trial, the associations believe they can show that the law school has failed to assert one of their proposed defenses, a circumstance they contend establishes their right to intervene. We apply the law of the case doctrine and dismiss No. 94-50569 for want of jurisdiction.

A.

The proposed intervenors are black student organizations at the University of Texas at Austin and its law school that, just prior to the trial of the merits appeal, sought to intervene, arguing that the law school would not effectively protect their interests in continuing racial preferences at the law school. The district court denied the proposed intervention on the ground that the law school and the two associations had the same objective: preservation of the status quo.

On expedited appeal, this court affirmed on the ground that the associations had failed to show that the law school had an interest different from theirs. We also commented that the two groups had failed to show "a separate defense of the affirmative action plan that the State has failed to assert." Id. at 606. The panel implicitly considered and rejected, as one potential divergence of interests, the possibility that the law school would not raise a defense based upon the legality of the use of TI scores under title VI, as the associations argued that possibility as one basis for intervention.

After their first motion to intervene was denied, the associations remained involved in the case. Throughout the course of the trial, they acted as amici curiae. And, at the close of trial but before judgment, the district court intimated that it would allow them to submit information for the record. Accordingly, the associations sought to introduce testimonial and documentary evidence supporting their arguments that (1) the TI by itself was an unlawful basis for admissions decisions under title VI and (2) that affirmative action at the university was constitutionally required. The plaintiffs opposed the introduction of evidence on these "new defenses," and the district court agreed. The associations were allowed to submit amicus briefs and highlight evidence that was already in the record but were not allowed to raise new issues or supplement the record.

Shortly thereafter, the associations again sought to intervene under FED.R.CIV.P. 24(a)(2) (intervention as of right), claiming that the law school had failed to raise their two "new defenses" and, accordingly, that events now showed that that representation inadequately protected their interests. They sought to reopen the record to introduce evidence supporting these arguments.

The district court summarily refused this request. That order is the focus of this separate appeal, in which the associations present only the title VI defense and ask to be allowed to present such evidence only if we do not affirm the judgment.

B.

There is no caselaw in this circuit that directly addresses how to review successive motions to intervene.[58] The parties

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[58] There is circuit law regarding successive motions, but the pertinent opinions do not examine the standard of review explicitly. See, e.g., Kneeland v. National Collegiate Athletic Ass'n, 806 F.2d 1285 (5th Cir.) (implicit application of de novo review without discussion of standard), cert. denied, 484 U.S. 817 (1987); United States v. Louisiana, 669 F.2d

direct us to Hodgson v. United Mine Workers, 473 F.2d 118, 125-26 (D.C.Cir.1972); United States Envt'l Protection Agency v. City of Green Forest, 921 F.2d 1394, 1401 (8th Cir.1990), cert. denied, 502 U.S. 956 (1991); and Meek v. Metropolitan Dade County, 985 F.2d 1471, 1477 (11th Cir.1993). These courts, which were examining whether the appeal from a successive motion was timely as per the appellate requirements, devised the general rule that a second motion would be treated as independent of the first if it was reached under materially changed circumstances.

Here, the associations assume that their second intervention motion is separate and distinct from their earlier failed attempt, because the law school's failure to raise their

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314, 315 (5th Cir.1982) (application of abuse of discretion review for timeliness determination on second motion where proposed intervenor failed to argue for first motion after remand); Calvert Fire Ins. Co. v. Environs Dev. Corp., 601 F.2d 851, 857 (5th Cir.1979) (implicit application of de novo review where district court treated second motion as both a reconsideration of prior motion and a new motion).

proposed defense constitutes a changed circumstance.[59] Thus, they ask that we engage in de novo review of their motion.

The plaintiffs, however, note that this motion was entitled a "renewed motion for intervention." The plaintiffs argue that the district court was reconsidering its previous denial order under its FED.R.CIV.P. 60(b) powers, and we should review merely for abuse of discretion.

C.

While the "changed circumstances" test may have merit--an issue we do not decide today--we do not find it applicable to this case. Instead, the "law of the case" doctrine militates against reconsideration of this motion. Normally, when a prior panel discusses an issue on the merits, a later panel cannot reach a contrary conclusion under the preclusive principle of law of the case. See Williams v. City of New Orleans, 763 F.2d 667,

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[59] The associations ground this argument in language taken from the prior appeal. One necessary element for intervention is a showing that the present parties will inadequately represent the proposed intervenors' interests. While the associations lost on this ground on the last appeal, they now claim that the opinion supports the argument that the law school's defense is inadequate. In the last appeal, we cited Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir.1990), as support for the following statement: "Nor have the proposed intervenors shown that they have a separate defense of the affirmative action plan that the State has failed to assert." Hopwood I, 21 F.3d at 606. Because the law school, now after trial, still has not asserted the associations' title VI defense, the associations maintain that they now can meet their burden.

In Jansen, however, the court found that the proposed intervenors had an interest different from that of the defendant city. 904 F.2d at 343. This was the basis for that court's holding that the city's representation was inadequate. See id. ("Proffering this alleged violation of the consent decree as an affirmative defense is directly counter to the City's interest.") (emphasis added). Here, we have already found that the law school's and the associations' interests are the same. Jansen therefore does not support intervention.

669 (5th Cir.1985). There is no question that the Hopwood I panel addressed the intervention as a matter of right de novo, on the merits, including the potential that the law school would not raise every defense proposed by the associations.

The question of whether we can rely upon the law of the case doctrine, however, is clouded because of the "anomalous" rule that exists in this circuit concerning the procedural posture of these intervention cases. Under that rule, we have only provisional jurisdiction to review a district court's denial of a motion to intervene.

If we agree with the district court, our jurisdiction "evaporates." Hence, the denial of leave to intervene when the party had a right to intervene is immediately appealable. On appeal, however, our rule "requires a merit review of any claim of intervention in order for [us] to determine whether or not the district court's order is appealable." Weiser v. White, 505 F.2d 912, 916 (5th Cir.1975). If the claim is without merit, then the order "is not appealable, the appellate court has no jurisdiction, and the appeal should be dismissed." Id. Thus, despite the merits review, this is a dismissal for want of jurisdiction.[60]

Our anomalous rule complicates the analysis of the preclusive effects of the prior panel decision, because dismissals

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[60] At least one set of commentators has eschewed this traditional rule. Their position is that "[a]ny denial of intervention should be regarded as an appealable final order." 7C WRIGHT, ET AL., supra, § 1923, at 508. Under this proposed rule, the federal court would "affirm denial of intervention when previously, having determined on the merits that the trial court was right, it would dismiss the appeal." Id. at 509. We have acknowledged that this would be the better rule. See Korioth v. Briscoe, 523 F.2d 1271, 1279 n. 26 (5th Cir.1975) (citing WRIGHT, ET AL., supra). In fact, the Hopwood I panel affirmed rather than dismissing for want of jurisdiction. Under the suggested rule, because we would have a final order on the merits from a previous panel on this issue, this case would probably be at an end. Nonetheless, as the anomalous rule constitutes our circuit caselaw, we are bound to follow it.

for lack of jurisdiction normally do not have preclusive effect. See, e.g., FED.R.CIV.P. 41(b). Accordingly, while appellate courts review denials of intervention motions on the merits, it is uncertain to what extent such a review has preclusive effect. Nonetheless, we recognize the possibility of issue preclusion on the question of jurisdiction itself.

While a dismissal for lack of jurisdiction does not operate as an adjudication on the merits, "[t]his provision means only that the dismissal permits a second action on the same claim that corrects the deficiency found in the first action. The judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal." 7C WRIGHT ET AL., supra, § 4436, at 338.[61] Thus, a party is precluded from successively appealing the same intervention motion.

Here, the record shows that the associations raised this same title VI argument before the Hopwood I panel in both their brief and at oral argument. That panel, reviewing de novo the merits of the associations' claims, denied intervention. Accordingly, the last panel implicitly addressed this issue, and we must respect its decision to deny intervention. The law of the case doctrine prevents merits review, and we dismiss No. 94-50569 for want of jurisdiction.[62]

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[61] A dismissal for want of jurisdiction, however, leaves open the possibility that the deficiency can be cured. If that occurs, no issue preclusion exists. See 7C WRIGHT, ET AL., supra, § 4436, at 338. It is at this point in the analysis that "changed circumstances" may become relevant. Arguably, the "changed circumstances" analysis, in effect, "cures" the earlier jurisdictional deficiency. Thus, if the circumstances of the case change to such an extent that jurisdiction would lie, the subsequent motion to intervene should not be dismissed for lack of jurisdiction. In effect, the posture of the case has changed, as it would any time a given jurisdictional problem is cured.

[62] In Hopwood I, we decided that (1) the interests of the associations were adequately represented by the law school and the state, and

VI.

In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. Because the law school has proffered these justifications for its use of race in admissions, the plaintiffs have satisfied their burden of showing that they were scrutinized under an unconstitutional admissions system. The plaintiffs are entitled to reapply under an admissions system that invokes none of these serious constitutional infirmities. We also direct the district court to reconsider the question of damages, and we conclude that the proposed intervenors properly were denied intervention.

In No. 94-50569, the appeal is DISMISSED for want of jurisdiction. In No. 94- 50664, the judgment is REVERSED and REMANDED for further proceedings in accordance with this opinion.

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(2) as a practical matter, disposition in the principal suit would not impair or impede either of those groups' interests. 21 F.3d at 605. The law of the case doctrine militates against revisiting that decision here.

For purposes of any future litigation, however, we note a necessary effect of our previous holding when coupled with the law school's failure to raise a title VI argument: Neither the district court's decision nor ours in this appeal is binding on the associations as res judicata, law of the case, collateral estoppel, or any other theoretical bar.

In short, as the title VI issue has not been litigated, the associations are not precluded from instituting a separate and independent title VI challenge to the law school's use of the TI. We neither express nor imply an opinion on the viability of such a challenge.

WIENER, Circuit Judge, specially concurring.

"We judge best when we judge least, particularly in controversial matters of high public interest."[1] In this and every other appeal, we should decide only the case before us, and should do so on the narrowest possible basis. Mindful of this credo, I concur in part and, with respect, specially concur in part.

The sole substantive issue in this appeal is whether the admissions process employed by the law school for 1992 meets muster under the Equal Protection Clause of the Fourteenth Amendment. The law school offers alternative justifications for its race-based admissions process, each of which, it insists, is a compelling interest: (1) remedying the present effects of past discrimination (present effects) and (2) providing the educational benefits that can be obtained only when the student body is diverse (diversity).[2]

As to present effects, I concur in the panel opinion's analysis: Irrespective of whether the law school or the University of Texas system as a whole is deemed the relevant governmental unit to be tested,[3] neither has established the existence of present effects of past discrimination sufficient to justify the use of a racial classification.[4] As to diversity, however, I respectfully disagree with the panel opinion's conclusion that diversity can never be a compelling

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[1] League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 931 (5th Cir.1993) (Wiener, J., dissenting).

[2] See Hopwood v. State of Tex., 861 F.Supp. 551, 570 (W.D.Tex.1994).

[3] I agree with the panel opinion that the defendants are overreaching when they urge that the State of Texas or its primary and secondary school system should be the relevant governmental unit.

[4] Panel Opn. at 43 & n. 44.

governmental interest in a public graduate school. Rather than attempt to decide that issue, I would take a considerably narrower path -- and, I believe, a more appropriate one -- to reach an equally narrow result: I would assume arguendo that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity.

I
THE LAW

A. EQUAL PROTECTION

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."[5] Accordingly, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[6] Racial classifications will survive strict scrutiny "only if they are narrowly tailored measures that further compelling governmental interests."[7] Thus, strict scrutiny comprises two inquiries of equal valence: the "compelling interest" inquiry and the "narrow tailoring" inquiry.[8] Moreover, these inquiries are conjunctive: To avoid constitutional nullity, a racial

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[5] U.S. Const., amend. 14, § 1

[6] Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2115, 132 L.Ed.2d 158 (1995) (emphasis added).

[7] Id.

[8] See id. at 2117. ("Racial classifications ... must serve a compelling governmental interest and must be narrowly tailored to further that interest.") (emphasis added); see also Miller v. Johnson,115 S.Ct. 2475, 2490 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling governmental interest.").

classification must satisfy both inquiries. Failure to satisfy either is fatal.

B. RACIAL CLASSIFICATION

None dispute that the law school's admission process for 1992 employed a racial classification. Depending on an applicant's race, his request for admission was considered under one of three different (and, as explained in the panel opinion, often dispositive[9]) TI admission ranges: one for blacks only, a second for Mexican Americans only, and a third for all other races and nationalities, including non-Mexican Hispanic Americans. In short, each applicant for admission to the law school was classified by race, and his application was treated differently according into which of those three racial classifications it fell. Thus, the law school's 1992 admissions process, like all racial classifications by the government, is subject to strict scrutiny.[10]

C. STRICT SCRUTINY

The law school contends that it employs a racially stratified admissions process to obtain, inter alia, the educational benefits of a diverse student body. Translated into the constitutional idiom, the law school insists that achieving student body diversity in a public graduate school is a compelling governmental interest. The law school invokes the opinion of Justice Powell in Regents of the University of California v. Bakke[11] to support that postulate. The panel opinion rejects that

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[9] See Panel Opn. at 6-7 (explaining that a Mexican American or a black applicant with a TI of 189 is presumptively admitted, while an "other race" applicant with an identical TI is presumptively denied).

[10] Adarand, 115 S.Ct. at 2115.

[11] 438 U.S. 265 (1978). Justice Powell opens his discussion of equal protection and diversity in Bakke by stating that the "attainment of a

support, concluding that from its inception Bakke had little precedential value and now, post-Adarand, has none. My fellow panelists thus declare categorically that "any consideration of race or ethnicity by the law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."[12]

This conclusion may well be a defensible extension of recent Supreme Court precedent, an extension which in time may prove to be the Court's position. It admittedly has a simplifying appeal as an easily applied, bright-line rule proscribing any use of race as a determinant. Be that as it may, this position remains an extension of the law--one that, in my opinion, is both overly broad and unnecessary to the disposition of this case. I am therefore unable to concur in the majority's analysis.

My decision not to embrace the ratio decidendi of the majority opinion results from three premises: First, if Bakke is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement. Second, Justice O'Connor expressly states that Adarand is not the death knell of affirmative action--to which I would add, especially not in the framework of achieving diversity in public graduate schools.[13] Third, we have no need to decide the thornier issue of compelling interest, as the narrowly tailored inquiry of strict scrutiny presents a more surgical and--it seems to me--more

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diverse student body ... clearly [is] a constitutionally permissible goal for an institution of higher education," id. at 311-12, and, in the unique context of institutions of higher learning, he concludes that diversity is a compelling interest. Id. at 312.

[12] Panel Opn. at 25 (emphasis added).

[13] Adarand, 115 S.Ct. at 2117 ("When race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

principled way to decide the case before us.[14] I am nevertheless reluctant to proceed with a narrowly tailored inquiry without pausing to respond briefly to the panel opinion's treatment of diversity in the context of the compelling interest inquiry

D. IS DIVERSITY A COMPELLING INTEREST?

Along its path to a per se ban on any consideration of race in attempting to achieve student body diversity, the panel opinion holds (or strongly implies) that remedying vestigial effects of past discrimination is the only compelling interest that can ever justify racial classification.[15] The main reason that I cannot go along with the panel opinion to that extent is that I do not read the applicable Supreme Court precedent as having held squarely and unequivocally either that remedying effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest. Indeed, the panel opinion itself hedges a bit on whether the Supreme Court's square holdings have gone that far,[16] particularly in the realm of higher education.[17]

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[14] See, e.g., Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J. dissenting) ("It is a fundamental rule of judicial restraint ... that this Court will not reach constitutional questions in advance of the necessity of deciding them.") (citing Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 157 (1984)).

[15] Panel Opn. at 26-29.

[16] The Court appears to have decided that "there is essentially only one compelling state interest to justify racial classification: remedying past wrongs." Panel opn. at 27 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (emphasis added)).

[17] Panel Opn. at 28 n. 27, (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (O'Connor, J. concurring in part and concurring

Between the difficulty inherent in applying Bakke[18] and the minimal guidance in Adarand,[19] the definition and application

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in the judgment)). ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest.").

[18] I readily concede that problems are encountered when efforts are made to apply the Supreme Court's Bakke decision. Panel Opn. at 20, 25, & 26 (respectively pointing out that (1) Bakke comprises multiple opinions and divergent analyses, (2) no Justice, other than Justice Powell, discusses diversity, and (3) Bakke is questioned in Adarand). The panel opinion fails to describe this last problem with precise accuracy. That opinion's expurgated version of the quotation at 26, lines 736-42 makes it appear as though the Adarand majority questioned Bakke. In full, the sentence reads "[the Court's] failure to produce a majority opinion in Bakke, Fullilove, and Wygant left unresolved the proper analysis for remedial race-based governmental action." Thus, although the Court acknowledges that Bakke et al. left things unresolved, I do not read this quotation, (as the panel opinion suggests) as an order to throw out Bakke--bath water, baby, and all.

Nevertheless, the fractured nature of Bakke's holding has left more questions than answers in its wake. As observed in the instant panel opinion, there has been "no [other] indication from the Supreme Court, ... [whether] the state's interest in diversity [in higher education] constitutes a compelling justification for governmental race-based classifications." Panel Opn. at 28. I agree that Bakke is the only indication that diversity is a compelling interest. But, unlike the panel opinion, which jettisons Justice Powell's Bakke opinion because of its singularity, I find that singularity to be precisely the factor that makes Justice Powell's opinion the most pertinent Supreme Court statement on this issue. Therefore, when and if the Supreme Court addresses this case or its analog, the Court will have no choice but to go with, over, around, or through Justice Powell's Bakke opinion. By assuming, as I do, that diversity is a compelling interest, however, these problems are avoided altogether.

[19] Recently, in Adarand the Supreme Court stated that it had "altered the [equal protection] playing field in some important respects." 115 S.Ct. at 2118. In her opinion for the majority, however, Justice O'Connor repeatedly emphasizes that Adarand did not drive a stake through the heart of affirmative action. To the contrary, she emphatically states, "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' "

of the compelling interest inquiry seems to be suspended somewhere in the interstices of constitutional interpretation. Until further clarification issues from the Supreme Court defining "compelling interest" (or telling us how to know one when we see one), I perceive no "compelling" reason to rush in where the Supreme Court fears -- or at least declines -- to tread. Instead, I would pretermit any attempt at a compelling interest inquiry and accept Justice O'Connor's invitation to apply the Court's more discernible and less intrusive "narrow tailoring" precedent.[20] Thus, for the purpose of this appeal I assume,

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Id. at 2117 (quoting Fullilove, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)). Moreover, "[w]hen race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." Id.

It seems to me that as a practical matter, Adarand resolves very little. In fact, the much heralded change is quite limited: Race-based classifications, imposed by the federal government, are now subject to strict scrutiny. Curiously (or perhaps not so curiously given the enigmatic difficulty of the task), the Supreme Court declined to define compelling interest or to tell us how to apply that term. Indeed, the Court did not even decide the case before it, opting instead to remand the case for further adjudication.

[20] Id. ("[W]hen race-based action is necessary to further a compelling interest, such action is within the constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

without deciding, that diversity is a compelling interest,[21] and proceed to the narrowly tailored inquiry.

E. TEST FOR NARROW TAILORING

When strictly scrutinizing a racial classification for narrow tailoring, the first question is "What is the purpose of this racial classification?"[22] The present effects rationale having proven feckless in this case, today's answer to that first question is a given: The law school's purpose is diversity. Accordingly, I perceive the next question to be, "Was the law school's 1992 admissions process, with one TI range for blacks, another for

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[21] Although I assume without deciding that diversity is a compelling interest, if I had no choice but to address compelling interest I would do so in the context in which the issue is presented, i.e., the constitutionally permissible means of constructing an entering a class at a public graduate or professional school. This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re- districting context; it comprises only the public higher education context and implicates the uneasy marriage of the First and Fourteenth Amendments. See Bakke, 438 U.S. at 311-12. Consequently, we play with fire when we assume an easy crossover of Fourteenth Amendment maxims pronounced in cases decided in such other contexts.

The panel opinion concludes that this contextual distinction is unimportant, holding that, whatever the context, remedying the past effects of discrimination is the only compelling interest that can justify a racial classification. Panel Opn. at 26-29. That opinion acknowledges, however, that Supreme Court precedent does not go this far: namely, the higher education context is different. Indeed the panel opinion quotes Justice O'Connor's words expressly stating that higher education is different. Panel Opn. at 28 n. 27 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling' at least in the context of higher education to support the use of racial considerations in furthering that interest.")).

[22] United States v. Paradise, 480 U.S. 149, 171 (1987).

Mexican Americans, and a third for other races, narrowly tailored to achieve diversity?" I conclude that it was not. Focusing as it does on blacks and Mexican Americans only, the law school's 1992 admissions process misconceived the concept of diversity, as did California's in the view of Justice Powell: Diversity which furthers a compelling state interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[23]

When the selective race-based preferences of the law school's 1992 admissions process are evaluated under Justice Powell's broad, multi-faceted concept of diversity, that process fails to satisfy the requirements of the Constitution.[24] The law school purported to accomplish diversity by ensuring an increase in the numbers of only blacks and Mexican Americans in each incoming class to produce percentages--virtually indistinguishable from quotas--of approximately five and ten percent, respectively. Yet blacks and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity. By

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[23] Bakke, 438 U.S. at 316. In the portion of his opinion that addresses narrow tailoring, Justice Powell concluded that California's admission process misconceived the concept of "diversity." Id. California's preferential program, focused as it was solely on aiding minority applicants, was not necessary to attain diversity. Id.

[24] In the instant litigation, the law school created its own Catch-22 by advancing two putative compelling interests that ultimately proved to produce so much internal tension as to damage if not fatally wound each other. Under the banner of prior discrimination, Texas had no choice but to single out blacks and Mexican-Americans, for those two racial groups were the only ones of which there is any evidence whatsoever of de facto or de jure racial discrimination by the State of Texas in the history of its educational system. But, by favoring just those two groups and doing so with a virtual quota system for affirmative action in admissions, the law school estops itself from proving that its plan to achieve diversity is ingenuous, much less narrowly tailored.

singling out only those two ethnic groups, the initial stage of the law school's 1992 admissions process ignored altogether non-Mexican Hispanic Americans, Asian Americans, and Native Americans, to name but a few.

In this light, the limited racial effects of the law school's preferential admissions process, targeting exclusively blacks and Mexican Americans, more closely resembles a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity. I concede that the law school's 1992 admissions process would increase the percentages of black faces and brown faces in that year's entering class. But facial diversity is not true diversity, and a system thus conceived and implemented simply is not narrowly tailored to achieve diversity.

Accordingly, I would find that the law school's race-based 1992 admissions process was not narrowly tailored to achieve diversity and hold it constitutionally invalid on that basis. By so doing I would avoid the largely uncharted waters of a compelling interest analysis. Although I join my colleagues of the panel in their holding that the law school's 1992 admissions process fails to pass strict scrutiny,[25] on the question of diversity I follow the solitary path of narrow tailoring rather than the primrose path of compelling interest to reach our common holding.

II
REMEDY

Before concluding, I am compelled to add a few words about the panel opinion's "commentary" regarding the remedy to be imposed by the district court on remand. Without employing the express language of injunction or affixing that label to its holding, the panel opinion's discussion of the remedy

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[25] I also concur in my colleagues' conclusion that intervention by the two black student organizations is not mandated, and do so for the same reasons.

on remand is "strongly suggestive" and has all of the substantive earmarks of an injunction:

> [The] plaintiffs have shown that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction to the effect that it may not do so for the purpose of (1) obtaining a diverse student body; (2) altering the school's reputation in the community; (3) combating the school's perceived hostile environment toward minorities; or (4) remedying the present effects of past discrimination by actors other than the law school.
>
> It is not necessary, however, for us to order at this time that the law school be enjoined, as we are confident that the conscientious administration at the school, as well as its attorneys, will heed the directives contained in this opinion. If an injunction should be needed in the future, the district court, in its discretion, can consider its parameters without our assistance. Accordingly, we leave intact that court's refusal to enter an injunction.[26]

Essentially, the substance of the quoted portion of the panel opinion constitutes a de facto injunction -- telling the district court precisely what to tell the law school that it can and can't do -- albeit without the use of the word injunction. To me, if "it" has feathers, swims, waddles, and quacks like a duck, it is a duck; and I find such an "un-injunction" inappropriate. If instead we were simply to reverse and remand on the violation issue, we would stop short of finding de novo that the law school had violated these four plaintiffs' equal protection rights. It seems unavoidable to me that until the district court determines that there has been a violation, a remedy cannot be

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[26] Panel Opn. at 59-60.

fashioned and should not be the subject of appellate speculation.[27]

The district court denied the plaintiffs injunctive relief, but only after assigning the burden of proof to the wrong party.[28] No member of this panel questions that, in the initial stanza of the burden- shifting minuet of Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,[29] the plaintiffs met their burden. Once the plaintiffs did that, the burden should have shifted to the law school. Instead, the district court left it with the plaintiffs and concluded that they had failed to carry the ultimate burden. The district court's failure to shift the burden to the law school, and the conclusion of that court which followed, were errors. Accordingly, like my colleagues of the panel, I would remand the case to the district court with instructions to relieve the plaintiffs of the misplaced burden while affording the law school the opportunity to prove that the prima facie violation established by the plaintiffs was essentially harmless. But it seems clear to me that this is where our analysis should end. As a result, I depart from the "commentary" in the panel opinion regarding the precise elements of the remedy to be fashioned by the district court if it should conclude on remand that the law school shall have failed to bear its burden.

III
CONCLUSION

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[27] Hay v. Waldron, 834 F.2d 481, 484 (5th Cir.1987) (The law is well-settled that the grant or denial of injunctive relief rests in the sound discretion of the district court); Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist., 669 F.2d 1038, 1048 (5th Cir.1982), cert. denied, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983).

[28] Panel Opn. at 55 ("We conclude that the Mt. Healthy methodology is appropriate in the instant case."). On this point, I agree with the panel majority that the Mt. Healthy burden-shifting minuet should apply.

[29] 429 U.S. 274, 284 (1977).

I end where I began: We should only decide the issues necessarily before this court, and then only on the narrowest bases upon which our decision can rest. This is not a class action; nothing is before us here save the claims of four individual plaintiffs. These four individual plaintiffs properly challenge only the admissions process employed by the law school in 1992 -- not the admissions process that was in place and employed in 1995, not the admissions process that is being employed in 1996, and not the admissions process to be applied in any future years. In sum, I would remand, and in the process I would take care not to eviscerate the discretion of the district court with excessive "commentary" or implicit directions on the precise nature of the remedy that must ensue. Rather, my remand would simply instruct the district court to apply the correct burden-shifting process articulated in Mt. Healthy, then see how the law school deals with it. That way, if the Mt. Healthy application should demonstrate the need for a remedy, the district court would be free to fashion the appropriate relief--including injunctive if necessary--for those among the individual plaintiffs whose individual cases warrant it. For this court to do anything beyond that impresses me as overreaching. Thus I concur in the judgment of the panel opinion but, as to its conclusion on the issue of strict scrutiny and its gloss on the order of remand, I disagree for the reasons I have stated and therefore concur specially.

United States District Court,
W.D. Texas,
Austin Division.

Filed August 19, 1994

Cheryl J. HOPWOOD, Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers,
Plaintiffs,
v.
The STATE OF TEXAS; University of Texas Board of Regents;
Bernard Rapopart,
Ellen C. Temple, Lowell H. Lebermann, Jr., Robert J. Cruikshank, Thomas O.
Hicks, Zan W. Holmes, Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley, as
members of the Board, in their official capacities; University of Texas at
Austin; Robert M. Berdahl, President of the University of Texas at Austin in
his official capacity; University of Texas School of Law; Mark G. Yudof, Dean
of the University of Texas School of Law in his official capacity; Stanley M.
Johanson, Professor of Law in his official capacity,
Defendants.

No. A 92 CA 563 SS.

MEMORANDUM OPINION

The plaintiffs, Cheryl J. Hopwood, a white female, and Douglas W. Carvell, Kenneth R. Elliott, and David A. Rogers,

three white males, have brought suit against the defendants[1] alleging violations of the Fourteenth Amendment, 42 U.S.C.A. § 1981 (West Supp.1994), 42 U.S.C.A. § 1983 (West 1981), and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West 1981).[2] All of these provisions prohibit discrimination because of race. For the alleged violations, the plaintiffs seek injunctive and declaratory relief, as well as compensatory and punitive damages. The plaintiffs contend the defendants discriminated against them by favoring less qualified black and Mexican American applicants for admission to the University of Texas School of Law through the use of a quota system. This cause was tried before the Court, without a jury, on May 16th through May 20th and May 23rd through May 25th, 1994.

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[1] Defendants Bernard Rapopart, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert Cruikshank, Thomas O. Hicks, Zan W. Holmes, Jr., Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley are sued in their official capacities as members of the University of Texas Board of Regents. Defendant University of Texas Board of Regents is the governmental entity created by Defendant State of Texas to administer the operation of the University of Texas system, which includes Defendant University of Texas at Austin as a component institution. Defendant University of Texas School of Law is an American Bar Association accredited law school operated by the University of Texas at Austin. Defendant Robert M. Berdahl is sued in his official capacity as president of the University of Texas at Austin. Defendant Mark G. Yudof is currently Provost of the University of Texas at Austin. At all times pertinent to this lawsuit, Yudof was Dean of the University of Texas School of Law and is sued in that official capacity. Defendant Stanley M. Johanson, a Professor of Law, is sued in his official capacity as Chair of the University of Texas School of Law Admissions Committee.

[2] The plaintiffs' Title VI, § 1981, and § 1983 claims serve as vehicles to enforce underlying rights guaranteed by the Fourteenth Amendment. Therefore, the law school's admissions program must be evaluated under the equal-protection clause of the Fourteenth Amendment.

The cause focuses on one of the most divisive issues faced by society, affirmative action, and highlights the tension that exists when the individual rights of nonminorities come into conflict with programs designed to aid minorities. The plaintiffs have contended that any preferential treatment to a group based on race violates the Fourteenth Amendment and, therefore, is unconstitutional. However, such a simplistic application of the Fourteenth Amendment would ignore the long history of pervasive racial discrimination in our society that the Fourteenth Amendment was adopted to remedy and the complexities of achieving the societal goal of overcoming the past effects of that discrimination. Further, the Supreme Court, which is continually faced with trying to reconcile the meaning of words written over a century ago with the realities of the latter twentieth century, has declined to succumb to an original intent or strict constructionist argument. Therefore, the Court will decline the plaintiffs' invitation to ignore the law established by the highest court of this land and to declare affirmative action based on racial preferences as unconstitutional *per se*. The issue before the Court is whether the affirmative action program employed in 1992 by the law school in its admissions procedure met the legal standard required for such programs to pass constitutional muster. The Court, having carefully considered the evidence presented at trial, the arguments of counsel, and the briefing provided by the parties, finds that it did not.

I. HISTORICAL BACKGROUND

The reasoning behind affirmative action is simple--because society has a long history of discriminating against minorities, it is not realistic to assume that the removal of barriers can suddenly make minority individuals equal and able to avail themselves of all opportunities. Therefore, an evaluation of the purpose and necessity of affirmative action in Texas' system of higher education requires an understanding of past discrimination against blacks and Mexican Americans, the minorities receiving preferences in this cause, and the types of

barriers these minorities have encountered in the educational system.

A. Discrimination in Primary and Secondary Education

The history of official discrimination in primary and secondary education in Texas is well documented in history books, case law, and the record of this trial. The Court, therefore, will address it only in summary fashion.

Even after the Supreme Court's decision in *Brown v. Board of Education*, the State of Texas adopted a policy of official resistance to integration of its public schools. This policy of resistance resulted in numerous lawsuits and court-imposed desegregation plans throughout the past twenty years. *Wright*, vol. 19 at 38-44; *Romo*, vol. 17 at 45-51. Many of the school districts found to be operating dual systems of education were also found to practice official discrimination against black and Mexican American students. *Wright*, vol. 19 at 40-43; *Romo*, vol. 17 at 45-51; *Rodriguez*, vol. 17 at 8-9.

The problem of segregated schools is not a relic of the past. Despite the fact that the public school population is approximately half white and half minority, minority students in Texas attend primarily majority minority schools while white students attend primarily white schools. *Glenn*, vol. 23 at 46-49. Further, as of May 1994, desegregation lawsuits remain pending against over forty Texas school districts. D-457; *see also* D-370, 373, 419; *Wright*, vol. 19 at 38-40; *Romo*, vol. 17 at 45-46.

The lack of educational opportunity for minorities has been compounded by the lower socioeconomic status of minorities in Texas. Statistics continue to indicate significant disparities between minority and nonminority students in skills and academic knowledge attained in the public schools. Although the generally lower socioeconomic status of black and Mexican American families is partially accountable for some of the disparities, the gap is exacerbated by historically inferior educational preparation of minorities. *Glenn*, vol. 23 at 30-36.

Further, at each educational level, there is a marked decline in the level of attainment by minorities, as reflected in comparison of drop-out rates between minorities and nonminorities and the percentages of the respective groups that graduate from high school and college.[3]

B. Discrimination in Higher Education

As with primary and secondary education, Texas' system of higher education has a history of state-sanctioned discrimination. Discrimination against blacks in the state system of higher education is well documented in history books, case law, and the State's legislative history. The State of Texas, by constitution and statute, previously required the maintenance of "separate schools ... for the white and colored children." *See* Tex. Const. art. VII, § 7 (1925, repealed 1969). This policy resulted in the establishment of segregated schools for blacks that were inferior to the white schools. Further, opportunities available to blacks to attend college were extremely limited.[4]

In 1946, when Heman Sweatt, a black man, sought admission to the law school and was refused admission, a Texas court, while holding that Article VII, Section 7 of the Texas

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[3] In 1990, the percentage of persons age 25 or older who completed high school was 81.5% non-Hispanic white, 66.1% black, and 44.6% Hispanic. D- 411. College graduate rates for the same year reflect 25.2% non-Hispanic whites, 12% black, and 7.3% Hispanic. D-412.

[4] The Texas Legislature created Prairie View State Normal & Industrial College for Colored Teachers at Prairie View (now Prairie View A&M University) for the education of "students to be taken from the colored population of this State." *Wright*, vol. 19, at 17, 19-21. Until 1947, it remained the only state-supported institution of higher learning open to black students in Texas; no type of professional training was available to blacks. *Commentary*, Tex. Const. art. VII, § 14 (West 1993). In 1947, to avoid integration of the University of Texas, the Texas Legislature created the Texas State University for Negroes (now Texas Southern University). *Id.* at 21-22; D-382.

Constitution precluded his admission, ordered the state to provide a law school for blacks. *See Sweatt v. Painter*, 210 S.W.2d 442 (Tex.Civ.App.--Austin 1948). The State hastily created a makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited. *Sweatt v. Painter*, 339 U.S. 629, 632, 70 S.Ct. 848, 849-50, 94 L.Ed. 1114 (1950). In 1950, a unanimous United States Supreme Court ruled that the State of Texas' provisions regarding the legal education of white and minority students violated the Fourteenth Amendment and ordered that Sweatt be admitted to the previously all-white University of Texas School of Law. *Sweatt*, 339 U.S. at 636, 70 S.Ct. at 851. Sweatt left the law school in 1951 without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings. *Wright*, vol. 19 at 24-25.

The *Sweatt* case is the most flagrant incident of state-sanctioned discrimination occurring against blacks at the University of Texas. However, the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students. Mexican American students were segregated in on-campus housing and assigned to a dormitory known as the "barracks," as well as excluded from membership in most university-sponsored organizations. *Romo*, vol. 17 at 43. Additionally, until the mid 1960s, the Board of Regents policy prohibited blacks from living in or visiting white dormitories. *Wright*, vol. 19 at 26-28; D-482.

Beginning in the mid 1970s, discrimination in Texas' system of higher education came under attack through a court-ordered investigation by the Department of Health, Education and Welfare (HEW) Office for Civil Rights (OCR). The investigation of Texas' system resulted from a lawsuit initiated in 1970 to require HEW to take action to enforce the provisions

of Title VI. [5] The court-ordered investigation of ten states, which did not include Texas, began in 1973. In 1977, the court extended the order to an additional six states, which included Texas. *Ashworth*, vol. 12 at 8; D-296.

Between 1978 and 1980, the OCR conducted an investigation of Texas' public higher education system. The investigation culminated in a finding that Texas had "failed to eliminate vestiges of its former de jure racially dual system of public higher education, a system which segregated blacks and

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[5] *See Adams v. Richardson*, 356 F.Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir.1973), *dismissed sub nom. Women's Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir.1990).

Title VI proscribes discrimination that violates the equal protection clause of the Fourteenth Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-87, 98 S.Ct. 2733, 2746-2747 (1978). The prohibitions against discriminatory conduct contained in Title VI govern "program[s] or activit[ies] receiving Federal financial assistance." 42 U.S.C.A. § 2000d. Thus, "Congress was legislating to assure federal funds would not be used in an improper manner." *United Steelworkers v. Weber*, 443 U.S. 193, 206 n. 6, 99 S.Ct. 2721, 2729 n. 6 (1979). The University of Texas, as a recipient of Title VI funds, is required to comply with Title VI.

The Department of Education, as the successor agency to HEW, is the governmental agency charged with the enforcement of Title VI and the review of programs funded through the DOE. The DOE has promulgated regulations to implement the provisions of Title VI, including regulations providing for affirmative action in certain circumstances. The regulations state that "[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of the prior discrimination." 45 C.F.R. § 80.3(b)(6)(I) (1993). The regulations state further that even if a recipient has never implemented discriminatory policies, if its services and benefits have not been equally available to some racial or nationality groups, the recipient may "establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." 45 C.F.R. § 80.5(j).

whites." D-297. Additionally, the OCR found that Hispanics were significantly underrepresented in state institutions and indicated it would continue its investigation of discrimination against Hispanics. *Id.*

During the early 1980s, the OCR and Texas officials engaged in considerable negotiations regarding efforts to bring Texas into compliance with Title VI. Texas, in an effort to achieve a state-wide desegregation plan acceptable to the OCR, attempted to address OCR concerns through submission of the Texas Equal Education Opportunity Plan for Higher Education (Texas Plan), which included a commitment to the goal of equal educational opportunity and student body desegregation for both black and Hispanic students. D-237. In 1982, Assistant Secretary of Education Clarence Thomas informed Governor Clements that the Texas Plan was deficient because the numeric goals of black and Hispanic enrollment in graduate and professional programs were insufficient to meet Texas' commitment to enroll those minority students in proportion to the representation among graduates of the state's undergraduate institutions. *Ashworth*, vol. 12 at 16-17; D-284. Texas revised its plan and resubmitted it to the OCR; the OCR found the modified plan to be deficient because it did not set targets for increasing minority enrollment for each institution, instead of on a statewide basis, and it did not project achievement dates for the targeted goals. *Ashworth*, vol. 12 at 19-20; D-219.

In 1983, the District Court for the District of Columbia entered an order in the ongoing Title VI-enforcement suit, in which the court found that "Texas has still not committed itself to the elements of a desegregation plan which in defendants' judgment complies with Title VI." D-446. The court ordered the DOE to begin enforcement proceedings against Texas unless Texas submitted a plan in full conformity with Title VI within forty-five days. *Ashworth*, vol. 12 at 22-23; D-446. In response to the order, the OCR submitted thirty-seven suggested measures for increasing black and Hispanic student enrollment in professional and graduate programs at traditionally white

institutions. Among the suggestions were that each graduate and professional school should re-evaluate its admissions criteria and that "admissions officers will consider each candidate's entire record and will admit black and Hispanic students who demonstrate potential for success but who do not necessarily meet all the traditional admission requirements." D-220.

In June 1983, the Texas Plan, as amended to account for the deficiencies identified by the OCR, was accepted by OCR as being in compliance with Title VI.[6] However, acceptance was contingent on adequate funding and completion of key activities within a specified time. D-314. Further, the Texas Plan was subject to monitoring for compliance until 1988. *Ashworth*, vol. 12 at 23, 25-26.

In November 1987, OCR contacted the state regarding the expiration of the plan in 1988 and indicated OCR would perform a final evaluation to determine if further action would be necessary to bring Texas into compliance with Title VI. OCR further instructed state officials that, pending the evaluation, Texas should continue to operate under the plan. *Ashworth*, vol. 12 at 32-34; D-323.

Because Texas Higher Education Coordinating Board officials determined Texas had not met the goals and objectives of the plan, the board voluntarily developed a successor plan (Plan II) to avoid a mandate from the federal government to negotiate another plan. *Ashworth*, vol. 12 at 34-35; vol. 13 at 45-46. Plan II did not contain any specific numeric enrollment

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[6] D-314. The revised plan raised the goal previously set for increased minority enrollment in graduate and professional schools. The individual goal for UT-Austin had been ten additional black students and two additional Hispanic students. *Ashworth*, vol. 12 at 26-27; vol. 13 at 56- 58. The revised plan included a commitment to "seek to achieve proportions of black and Hispanic Texas graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs." D-238a at 5.

goals but retained Texas' commitment to increasing black and Hispanic student enrollment. D-326 at 9.

To date, OCR has not completed its evaluation to determine if Texas is in compliance with Title VI.[7] However, in January 1994, the DOE notified Governor Richards that OCR was continuing to oversee Texas' efforts to eliminate all vestiges of *de jure* segregation and that it would be reviewing the Texas system in light of *United States v. Fordice*, ___ U.S. ___ , 112 S.Ct. 2727 (1992). *Ashworth*, vol. 12 at 35-38; D-293.

Against this historical backdrop, the law school's commitment to affirmative action in the admissions process evolved.

II. THE ADMISSIONS PROCESS

A. Evolution of the Admissions Process and Affirmative Action

The law school's admissions procedure was not always a complicated process. In the early 1960s, all applicants who had taken the LSAT and had at least a 2.0 or 2.2 grade point average on a 4.0 scale were accepted.[8] In about 1965, the number of applicants began to significantly exceed the law school's capacity, and, as a result, the law school established additional criteria to aid in the selection process. *Smith depo.* at 7-8.

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[7] *Ashworth*, vol. 12 at 32-24. The government, as usual, proceeds with "all deliberate speed."

[8] *Johanson*, vol. 3 at 12. Ernest Smith, who was a member of the admissions committee from 1965 through 1970 and dean of the law school from 1974 to 1979, testified by deposition that his recall of the required grade point average at that time was 3.0. *Smith depo.* at 7. Although neither Smith nor Johanson had exact recall of the number, their testimony is consistent in that the qualifications for admission at the time were minimal.

Under the more selective system, a baseline was established each year based on the Texas Index (TI).[9] The law school automatically admitted applicants whose TI exceeded the baseline, and the admissions committee reviewed applicants whose TI was below the baseline. This procedure was used until the late 1960s when an inundation of applications meeting the baseline criterion created a class of more students than could be adequately accommodated and precluded review of those who did not qualify for automatic admission. That particular year, the first-year class of law students consisted of almost 700 students. *Johanson*, vol. 3 at 14.

As a result, the law school modified the admissions process and changed the automatic admission baseline to a presumptive admission score. Additionally, the admissions committee began to use a presumptive denial baseline, and applicants whose TI fell below that baseline were presumptively denied admission. Also during the late 1960s, the law school began implementing affirmative action by attempting to recruit minority individuals who had performed well in the CLEO program.[10] The only race or ethnic-based scholarships available during this time, however, were limited to "whites only." *Smith depo.* at 12.

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[9] The Texas Index is a composite number calculated by the Law School Data Assembly Service (LSDAS) that reflects an applicant's grade point average and LSAT score. The weight attributed to each component of the TI is determined by a prediction formula derived from the success of first year students in preceding years. *Johanson*, vol. 3 at 7-10.

[10] The CLEO (Council on Legal Education Opportunity) program provided summer training at participating law schools for minority graduates of various universities. At the end of the training period, the CLEO participants were given exams. Based on their performance on those exams, some of the participants were admitted to the law school. *Smith depo.* at 9-10.

A perception began to develop that the CLEO program had shifted its focus from students who were just below the level where law schools would seriously consider them for admission to students who were significantly below that level. *Smith depo.* at 14-16. Therefore, those responsible for admissions at the law school felt that the CLEO program could not successfully prepare the participants in one summer to be competitive students in a regular law school class. *Id.* at 16. Additionally, minorities represented only a small percentage of the entire pool of applicants to the law school, and law schools around the country competed for the top minority applicants. *Id.* at 18. In 1971, after the law school terminated its participation in the CLEO program, the law school admitted no black students. *Wright*, vol. 19 at 32.

In the early 1970s, because of the university's concern over the few minority students enrolled in the law school, a separate admissions committee, informally called the "Treece committee,"[11] was formed to consider applications from minority students and disadvantaged nonminority students.[12] The purpose of the committee was to ensure that the applicants the committee reviewed received "fuller consideration" than they would have in the regular admissions process. *Smith depo.* at 16. The applicants were evaluated separately from the applicants before the regular admissions committee, and the sole criterion for

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[11] The committee was named after the chair of the committee, Professor James Treece.

[12] In the summer of 1974, just before Ernest Smith became dean of the law school, the then president of the university, Steve Spurr, expressed concern about the low minority population in the law school. Spurr indicated that a public university had an obligation to train a reasonably representative cross-section of the population in the law and that the TI, as the focus of the admissions procedure, did not adequately account for an applicant's ability to overcome past economic, cultural, and discriminatory practices. *Smith depo.* at 17.

applicants before the Treece Committee was whether the applicant had a reasonable prospect of passing the first year.[13] The Treece committee had no set goals for the number of admissions to be made through the committee, and the number of applicants it admitted had little impact on the regular admissions.[14] In 1977, the Treece committee considered 500 applicants, including approximately 100 nonminority applicants. Of these applicants, the Treece committee admitted sixty-eight minority students and three nonminority students. "Thus, while the special subcommittee did consider and grant admission to some white applicants, the predominant objective of the special subcommittee was to increase minority enrollment at the Law School." P-1 (Smith memo to Rogers, Oct. 18, 1978, at 1).

The applications before the regular admissions committee were subjected to a different process. Because of the volume of applications, the admissions committee could not give individual consideration to each application. Therefore, the law school implemented a three-category system to narrow the pool of applications requiring committee consideration. The first category of applicants, those with TIs above a certain number, were granted "administrative admission"; that is, administrative personnel automatically sent offers of admission to these applicants based on the applicants' TIs. A "presumptive denial" category was at the other end of the scale, in which administrative personnel screened the applications based on specified criteria. If the administrative person determined the file warranted further consideration, the file was sent to the

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[13] *Johanson*, vol. 3 at 15. Professor Johanson did not recall if any of the members of the Treece committee were also members of the regular admissions committee.

[14] During this time, the law school entering class was comprised of 500 students, and no more than 10% of the students could be nonresidents. *Johanson*, vol. 3 at 17.

regular admissions committee. The admissions committee reviewed the individual applications in the middle category or "discretionary zone," which included those referred to the committee from the presumptive denial category.

The law school used this admissions procedure until 1978 when, as a result of the Supreme Court's decision in *Bakke*, the law school reassessed its minority admissions procedure. The law school determined that, although its procedure differed from that at issue in *Bakke*, the use of the separate committees to evaluate applicants was defective.[15] Therefore, then Dean Smith directed the admissions committee to operate as one unit rather than as two subcommittees and instructed the committee to establish the administrative admission and presumptive denial lines at levels that would increase the number of applicants given individual consideration. P-1.

After 1978, Johanson set the lines to allow for a reasonable number of minority candidates to be included with nonminorities in the discretionary zone. *Johanson*, vol. 3 at 21. The discretionary zone was then divided into five or six "bands." [16] The law school offered admission to a set percentage of applicants from each band. The percentage decreased from the first or top band to the last, a reflection of the diminishing credentials of the bands. The minority applicants were primarily clustered in the lower bands with few in the upper bands. *Wellborn*, vol. 24 at 45.

Within each band, minority and nonminority files were blended into groups of thirty. Each pile was reviewed by three committee members, each of whom was allocated a certain fixed

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[15] The law school's procedure differed from the *Bakke* procedure in that no fixed number of seats were set aside for minorities and some nonminorities were evaluated by the Treece committee. P-1 (Smith memo at 3).

[16] Professor Johanson testified the system used five bands, while Professor Wellborn testified there were six bands.

number of votes determined by the yield desired from a particular band. Therefore, each member of the committee ultimately had total discretion to decide whether and what extent to implement affirmative action for each pile of files that person reviewed. *Wellborn*, vol. 24 at 9. Professor Wellborn testified he and other faculty members perceived two problems with this system: 1) potential unfairness to nonminority candidates who could be affected by affirmative action solely as a result of the pile in which they were included and 2) the application of personal affirmative action efforts, requiring no justification to the committee as a whole, rather than a system based on a set policy. As a result, in 1980, the law school abandoned the banding admissions procedure and formed the minority subcommittee.

The minority subcommittee was a part of the full committee that reviewed and voted on nonminority files. All minority files below the presumptive admission line were studied by the minority subcommittee.[17] The subcommittee would then bring its recommendations to the full committee. At some point during the middle of the admissions process, the subcommittee would present a report to the full committee that summarized the features of the minority files being recommended for admission. The actual files were also available at the meeting so the full committee could make its own determinations about the

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[17] Evidently, sometime between 1978 and 1991, the automatic or administrative admission line was changed to a presumptive admission line. The testimony is unclear as to when this occurred and, apparently, even after the change was made, those involved with the admissions procedure continued to make reference to automatic admission. *Johanson*, vol. 3 at 26, 66; *see also id.* at 29 ("I think we used the term 'automatic admit' for a long period of time, when it became part of the colloquium but did not describe the process."). Dean Sutton, who succeeded Dean Smith and was dean from 1979 to 1984, established the rule that approximately 55% of the resident class should fall within the presumptive admission category. *Johanson*, vol. 3 at 24-25. Approximately 75% of nonresident applicants are admitted from the presumptive admission category for nonresidents. *Id.*

recommended minority applicants in comparison to the nonminority applications pending at the time. At this point in the process, the members of the full committee were involved in reading piles of nonminority files and were cognizant of the qualifications of the nonminorities. Although this method often resulted in heated discussion and disagreement among committee members over whether to admit a particular candidate, the process also provided open discussion rather than the silent voting, which could have reflected personal agendas, that occurred with the banding procedure. *Wellborn*, vol. 24 at 15.

In the early 1980s, during these meetings, the committee members spent considerable time debating whether individual minority candidates met minimum admissions standards and, thus, could do passing work in law school. As a result, the full committee often examined specific minority files. The ultimate effect was that the entire committee voted on each minority applicant that the subcommittee brought before the full committee. *Goode*, vol. 9 at 6. However, as the pool of minority candidates improved, the focus of the meetings shifted to choosing among minority candidates that the committee knew, based on their TIs, could succeed in law school. *Wellborn*, vol. 24 at 33. Therefore, less full committee review of each individual file became necessary.[18]

Ultimately, the admissions committee determined that the process was inefficient and not the most effective way of

[18] Because the law school was receiving better qualified minority applicants, the focus of the process changed from whether to accept a particular minority applicant to a more selective process between the individual minority applicants. *Wellborn*, vol. 24 at 33. Had the admissions committee continued to apply its previous standards, the number of minorities in the entering class would have continued to grow. However, the committee elected instead to "take advantage of this opportunity to have more excellent minority students than we had before, who would be more competitive with the non-minority students, but perhaps in more limited numbers that would still constitute reasonable representation." *Id.* at 35.

processing minority applicants. *Johanson*, vol. 5 at 27. In April 1991, "[a]fter considerable debate, the [admissions] committee, over some strong opposition, directed the chair [Johanson] to form a subcommittee (including Deans Aleman and Hamilton and the two minority students) which was to review the minority files and recommend sufficient candidates for admission to achieve a class that was 5% Black and 10% MA."[19] Therefore, by 1992, the full admissions committee no longer selected individual applicants for admission. *Wellborn*, vol. 24 at 53. Instead, the minority subcommittee compiled a list and presented it to the full committee, which made a judgment of how many offers to give to minority applicants. The minority subcommittee was then delegated the task of deciding which individual minority applicants were to receive offers of admission. Thus, by 1992, the admissions process, although involving some interaction and exchange of information between the full committee and minority subcommittee, was markedly similar to the pre-*Bakke* procedure of two separate committees. This 1992 procedure is the crux of this lawsuit.

B. 1992 Admissions Process

In 1992, the admissions committee was comprised of nine professors, two assistant deans, and four students. *Johanson*, vol. 6 at 26. The minority subcommittee was comprised of Johanson, Aleman, and Hamilton, all of whom were also members of the full committee.[20] Aleman, however, did not participate in reviewing nonminority applications. *Johanson*, vol. 6 at 25-26.

[19] P-25. The percentage goals are based on the percentages of minority college graduates. *See supra* note 6.

[20] Professor Johanson, who is white, has been on the admissions committee since 1964 and chair of the committee since 1973. Dean Aleman is an assistant dean and is Mexican American. Dean Hamilton was an assistant dean from 1990 through 1993 and is black.

In 1992 when an application arrived, administrative personnel placed it in an individual folder, to which additional materials, such as letters of recommendation, were added as they arrived at the law school. Each folder was color-coded based on two criteria: residency and race or ethnicity. The residency classification indicated whether the applicant was a resident or nonresident of Texas. The race or ethnicity classification was based on which of several boxes the applicant checked on the application: Black/African American, Native American, Asian American, Mexican American, Other Hispanic, White, or Other. *Hamilton*, vol. 2 at 19-20.

The application deadline was February 1. However, because the law school wished to get early offers sent to top applicants in late January if possible, Johanson drew initial presumptive admission lines as soon as he had an initial computer printout showing the numbers and qualifications of the applicants. *Johanson*, vol. 3 at 26-27. At this point, about half of the applications were complete; therefore, Johanson drew the initial lines relatively high to avoid too many early offers of admission before the quality of the entire pool of applicants was defined.[21] The goal of the initial presumptive admission lines Johanson drew was to ensure that the top candidates in each category received offers of admission from the law school as soon as possible.[22]

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[21] At some point in the process, the presumptive admission line for nonminority resident admissions was adjusted downward to ensure that approximately 55% of the resident admissions would be presumptively admitted. The 55/45 split did not apply to nonresident applicants, approximately 75% of whom were admitted presumptively on the basis of their TI. *See supra* note 17.

[22] *Johanson*, vol. 3 at 26. In 1992, the law school received approximately 2100 resident applications and 2300 nonresident applications. *Johanson*, vol. 3 at 35. The pool of nonresident applicants was very strong, many with credentials well above those of the presumptively admitted residents. *Id.* at 36. Accordingly, the presumptive admission and denial

Once Johanson determined which files were in the presumptive admission category, he conducted a preliminary review of the files.[23] By the end of the admissions process, Johanson reviewed 300 to 350 resident files and 200 to 250 nonresident files in this category. *Johanson*, vol. 3 at 32-35. In his review of these files, Johanson checked to see if the applicant's TI was inflated by high grades in a noncompetitive major or at a weak school or if there was some other questionable feature of the applicant's file. Johanson generally held those files for further review in the discretionary zone. Johanson dropped approximately ten percent of the presumptive admission applicants into the discretionary category. Those applicants with a high TI reflecting a high LSAT and high grades in a rigorous major at a leading undergraduate institution were admitted by Johanson, who had unilateral authority to admit any applicant in this category without further consultation with the full admissions committee. D-362.

At the other end of the spectrum, Johanson set another line, and applicants whose TIs fell below that line were presumptively denied admission. One or two members of the admissions committee reviewed each application in this category to determine if the TI adequately reflected the applicant's likelihood of success in law school or competitive standing relative to the entire applicant pool. *Johanson*, vol. 3 at 31-32; P-41; D-362. Generally, as a result of this review, twenty to

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scores were set at a higher level for nonresident applicants. However, as with resident applicants, lower scores were set for Mexican American and black nonresident applicants than for nonminority nonresident applicants.

Johanson testified the enrollment yield for nonresidents is approximately 26%, meaning that the law school has to offer approximately four nonresidents admission to enroll one. *Id.* at 37. The enrollment yield for residents is 66 to 68%, that is, for every 100 offers of admission, 66 to 68 resident applicants accept.

[23] Johanson reviewed minority and nonminority files together as a group during the preliminary review process. *Johanson*, vol. 6 at 55.

forty files were upgraded from the presumptive denial zone to the discretionary zone, although Johanson did not recall the specific number of files moved to the discretionary zone in 1992. *Johanson,* vol. 5 at 24-25.

The middle category was comprised of those applicants whose TIs fell between the presumptive denial line and the presumptive admission line, those applicants who Johanson had moved down from the presumptive admission category, and those applicants who reviewers had moved up from the presumptive denial category. In the middle discretionary category, reviewers focused less attention on the applicant's numbers, as all were relatively close, and instead carefully evaluated the applicant's qualifications as reflected by the entire file. *Goode*, vol. 9 at 4; D-362.

The standards the law school applied to assess applicants in this system differed based on race and national origin in two ways. First, Johanson's determination of the presumptive admission and denial TIs varied between nonminorities and minorities.[24] By March 1992, Johanson had lowered the presumptive admission score for resident nonminorities from a threshold setting of 202/90 to 199/87.[25] Similarly, Johanson lowered the presumptive admission score for Mexican American applicants from 196/84 to 189/78 and the presumptive admission score for black applicants from 192/80 to 189/78. P-49. The

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[24] Johanson's setting of these scores was a process that evolved over the course of the admissions process based on the pool of applicants, the number of offers, and the number of acceptances. Initially, the numbers were set high and lowered as the yield from offers and composition of the entering class began to develop. *Johanson*, vol. 5, at 10-11; P-38--P-44.

[25] P-38. In 1992, the law school was faced with two different types of TIs, one based on a two digit LSAT score and one based on a three digit LSAT score. This was a result of the change in the scaling of the LSAT from a 10-to-48 scale to a 120-to-180 scale. Johanson therefore had to set presumptive lines coordinated to two separate TI formulas to accommodate the two types of TIs received for applicants. *Johanson*, vol. 3 at 26-27.

presumptive denial score for nonminorities was 192/80, and the presumptive denial score for blacks and Mexican Americans was 179/69. Thus, the presumptive denial score for nonminorities was higher than the presumptive admission score for minorities.

Additionally, the law school admissions committee had different procedures for the review of nonminority and minority files in the discretionary zone. Nonminority files were divided into stacks of thirty, which were reviewed by three members of the admissions committee.[26] Each person on the three-person subcommittee voted, on an individual basis with no verbal or written explanation, to offer admission to a set number of applicants from within the stack of thirty files.[27] After the three members completed their independent screening of the files, Johanson compiled a master tally sheet reflecting the number of votes received by each applicant in the group of thirty-five. *See, e.g.*, P-73. Subject to Johanson's review, those applicants that received two or three votes were offered admission.[28] In 1992, the law school made an average of nine offers of admission per stack. P-58. Those who received no votes were automatically

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[26] In 1992, the admissions committee reviewed 18 stacks in the nonminority discretionary zone--17 stacks of 30 files and one stack of 16 files. P-58, P-59. This process began in early March and was virtually complete by mid to late April. *Johanson (by depo.)*, vol. 25 at 7.

[27] In 1992, Johanson allotted each person on the subcommittees nine votes per stack. D-332 at A-29. Committee members were required to screen five stacks. P-55. Therefore, although each member of the admissions committee reviewed more than one stack of files, no individual reviewed all the files in the discretionary zone.

[28] Johanson testified that he had "rarely, if ever" vetoed a committee recommendation based on two or three votes, except in instances where an administrative problem might make an individual ineligible for law school.

denied admission at that time.[29] The law school sent a letter offering applicants who received one vote a place on the waiting list.

The minority subcommittee reviewed the minority files. In theory, each member of the subcommittee was to be part of the three-person subcommittees that reviewed the nonminority files. The testimony reflected, however, that in 1992 Aleman was not on any of the nonminority screening subcommittees. *Compare D- 362 with Johanson*, vol. 6 at 26. According to the testimony, instead of each member of the minority subcommittee performing an individual review of the minority files, as was the procedure for review of nonminority files, the minority subcommittee met as a group and reviewed each minority applicant's file.[30] The subcommittee did not review a set number of files at each meeting but, instead, made as many decisions as the members felt comfortable with until their "decision-making powers started to wane." *Johanson*, vol. 5 at 30. Resident presumptive denial minority files were screened exclusively by Johanson and Hamilton. *Id.* at 25.

The members of the minority subcommittee attended the meeting of the full committee and provided the full committee

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[29] Johanson, in rebuttal testimony provided by deposition, testified, "[T]hose candidates who receive zero votes to admit, they're done. *I don't even look at their files*. Three people have said in comparison to our applicant pool they are not worthy of being admitted. They will--the next day they will get their denial...." *Johanson (by depo.)*, vol. 25 at 10 (emphasis added). This testimony contradicts the statement in the law school's "Statement of Policy on Affirmative Action," which states that all final decisions on each applicant file are made by Johanson. *See* D-362 at 4.

[30] Both Johanson and Hamilton attended all the meetings; Aleman's attendance was not regular. Frequently, student members of the subcommittee attended the meetings, although they were not voting members of the subcommittee. *Johanson*, vol. 5 at 28-29.

with a summary of the files the subcommittee believed to be good applicants for admission. *Wellborn*, vol. 24 at 18. Although the evidence reflected that the subcommittee shared general information about the minority pool of applicants with the full committee, the minority subcommittee's admission decisions on individual applicants were virtually final.[31]

C. Admission Goals and Guidelines

The law school is the State's premier law school and is top-rated nationally. The cost of a legal education at the law school, a state-supported institution, is inexpensive in comparison to other schools of its caliber and, therefore, a bargain for the quality of education the law school's students receive. As a consequence, over 4000 applicants to law school each year compete for approximately 500 available seats.[32]

In selecting the entering class, the law school admissions committee has two specified requirements it must achieve. First, state law mandates the percentage of nonresidents that may be included in the entering class. In 1992, the law school was prohibited from having more than fifteen percent nonresidents in

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[31] Johanson testified that, although a "particularly naughty problem" might be brought before the entire committee, almost all final decisions were made by the subcommittee. *Johanson*, vol. 5 at 29; *see also Johanson*, vol. 6 at 47.

[32] The law school received 4,494 applications for the fall 1992 incoming class. It offered admission to 936 applicants to fill a class of slightly over 500 students. D-447 (Aff. of Rita Bohr at A-4). The overall median GPA for entering students was 3.52, and the overall median LSAT was 162 (89th percentile). D-433. The median figures for nonminorities were a GPA of 3.56 and an LSAT of 164 (93rd percentile); for blacks, a GPA of 3.30 and an LSAT of 158 (78th percentile); and for Mexican Americans, a GPA of 3.24 and an LSAT of 157 (75%). *Id.*

the entering class.[33] The other fixed figure to which the admissions committee must adhere has been set by the Board of Regents. This mandate requires the entering class to be composed of at least 500 students.

In addition to these established figures, the law school attempts to meet the targets established by the Office of Civil Rights through the Texas Plan of ten percent Mexican American students and five percent black students in an entering class. *Johanson*, vol. 4 at 10. These numbers reflect an effort to achieve an entering class with levels of minority enrollment generally consistent with the percentages of black and Mexican American college graduates. The OCR figures, however, are aspirations only, subject to the quality of the pool of applicants. *Johanson*, vol. 4 at 9; *Goode*, vol. 9 at 12-13.

Personal interviews are not part of the law school's admission process.[34] Therefore, the law school must make its decision based on the information provided in the applicant's file, which, in addition to the application form and LSDAS material, may include a personal statement or letters of recommendation. The law school used the TI as an administrative tool to order candidates for review in the admissions process. However, the law school did not rely solely on the TI as the basis for admissions decisions but instead used it to create presumptions that could be overcome upon individual

[33] *Johanson*, vol. 4 at 9, 31. The percentage of nonresidents that may comprise an entering class has recently been increased to 20%. *Johanson*, vol. 4 at 46.

[34] Nevertheless, Hamilton, as assistant dean of admissions responsible for recruiting the law school class, actively recruited minority students through "one-on-one" discussions and scholarship enticements *Hamilton*, vol. 2 at 4-5, 9, 12-13.

review of the files.[35] The importance of individual review stems from the fact that the applicants selected for admission come from a relatively narrow band within the full range of scores, and a difference of few points does not necessarily correlate with more successful work in law school. *Johanson*, vol. 3 at 11; *Stein*, vol. 18 at 15. Further, the TI does not adequately reflect the qualifications and characteristics a law school should consider in developing a diverse student body, which provides substantial educational benefit for all members of a law school class. *Brest*, vol. 22 at 14.

III. THE PLAINTIFFS

In 1992, Hopwood, Elliott, Carvell, and Rogers applied for admission to the law school. Hopwood is a white female; Elliott, Carvell, and Rogers are white males. None of the plaintiffs are Mexican American and all are residents of Texas.[36]

[35] The practice of using the GPA/LSAT index as a sorting mechanism is used by many nationally prominent law schools. *Brest*, vol. 22 at 13-14; *Stein*, Vol. 18 at 15; *Bollinger*, vol. 16 at 11-14; *Wegner depo.* at 9-10. However, none rely on the index as the sole basis for admission decisions. *Id.*; *see also* D-448.

[36] The defendants contend that Hopwood should have been evaluated as a nonresident and, accordingly, would not have been in the presumptive admit range for nonresidents. However, Johanson testified that Hopwood did not misrepresent her status to the law school. She stated in her application she was married to a person in the military who was stationed in Texas at the time of her application. The law school treated her application as that of a resident throughout the process. Johanson, vol. 5 at 14. Further, Hopwood's residency classification was consistent with the law school's policies in effect at the time. *Id.*; *Johanson*, vol. 4 at 44-45; *Hopwood*, vol. 8 at 12-13.

A. Cheryl Hopwood

Cheryl Hopwood had a TI of 199, which placed her in the resident presumptive admit range. Hopwood's TI reflects a 3.8 grade point average and an LSAT score of 39.[37] Hopwood's application indicates she received an associate's degree in accounting from Montgomery County Community College in May 1984 and a bachelor's degree in accounting from California State University in Sacramento in 1988. The application further indicates she is a certified public accountant in California, she worked twenty to thirty hours a week while obtaining her undergraduate degree, and she was active in Big Brothers and Big Sisters in California. P-145. Hopwood submitted an additional letter to the law school dated January 22, 1992, requesting permission to attend law school on a limited basis the first year, if accepted, because of the needs of her child, who had been born with cerebral palsy.[38] Hopwood's application file contains no letters of recommendation.[39] Additionally, her responses to the questions are brief and do not elaborate on her

[37] Hopwood's LSAT score placed her in the 83rd percentile, well below the median LSAT for nonminorities in the 1992 entering class. P-145; D- 433. Her two-digit TI was an 87, which correlates to 199 in the three-digit scoring system.

[38] Hopwood testified that although her child was initially diagnosed with cerebral palsy, she has been found to have an extremely rare muscle disease and is severely handicapped. *Hopwood*, vol. 8 at 8-9. This information is not included in her admission file.

[39] Hopwood testified that although she had been prepared to submit letters of recommendation, a person in the admissions office informed her that, because of the large number of applications, the school did not have time to look at recommendations. *Hopwood*, vol. 8 at 6.

background and skill. She provided no personal statement with the application.[40]

After his initial review of Hopwood's file, Johanson dropped her from the presumptive admission zone to the discretionary zone because, in his evaluation, she had not attended schools that were academically competitive with those of the majority of the applicants, had a large number of hours at junior colleges, and was able to maintain a high GPA although working a substantial number of hours.[41] Her file was subsequently reviewed by a three-member subcommittee of the admissions committee, which was comprised of Associate Dean Michael Sharlot, Dean Hamilton, and a law student. P-217 (Answer to int. 3). Because Hopwood received only one vote as result of the subcommittee review, the law school sent her a

[40] Hopwood testified that while in high school, she applied for college at Temple, Princeton, and Penn State and was offered admission at each school. However, because she had to pay for her own education and had to work her way through school, she could not afford to go to these schools. *Hopwood*, vol. 8 at 4. However, this information is not included in Hopwood's application despite the following statement on the application: "Please make any other comments about your college transcripts or your preparation for college (such as disadvantaged educational or economic background) that you believe will help the Admissions Committee in evaluating your application."

[41] *Johanson*, vol. 5 at 14-17. Johanson believed that Hopwood's ability to work a significant number of hours while maintaining a high GPA was indicative of earning her GPA while on "a fairly slow track" at a non-competitive institution. *Id.* at 15-16. In contrast, Associate Dean Sharlot found that Hopwood's achievement of a high GPA while working was a "definite plus." D-334. This "plus," however, was insufficient to overcome Hopwood's below-median performance on the LSAT and attendance at a series of "very weak schools." *Id.*

letter, dated April 8, 1992, offering her a place on the waiting list.[42]

The letter, which stated "[w]e regret that we cannot grant you admission to the 1992 entering class of the Law School at this time," instructed Hopwood to return the attached form to the law school within three weeks if she wished to be placed on the waiting list. P-145. The letter further instructed Hopwood not to put her name on the list if she would not be able to accept an offer of admission as late as August. Hopwood testified she subsequently called the law school admissions office and was told offers could be made from the waiting list through the first week of school. *Hopwood*, vol. 8 at 11-12. Hopwood did not put her name on the list because personnel in the law school's admissions office could provide no information regarding the likelihood of admittance from the list and Hopwood did not believe she would be in a position to make last minute arrangements for her special childcare needs if she were admitted either just before or in the first week of classes. *Hopwood*, vol. 8 at 12.

The Court finds that, under Hopwood's circumstances, she was effectively denied admission when she received the April 8 letter. Her failure to accept a position on the waiting list or to seek a deferral of admission until the following year, which information the Court notes is not included in the law school's April 8 letter to Hopwood, does not negate this fact.[43]

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[42] Hopwood received one vote from Hamilton, who was also a member of the minority subcommittee. P-217 (Answer to int. 4); D-333 at A-37.

[43] The Court notes that during 1992, individuals were offered admission from the waiting list. Of the 332 applicants offered a position on the waiting list in 1992, 75 were admitted. D-447 (Aff. of Rita Bohr at A-5). Hamilton testified that as late as the first week of classes, seven persons were admitted from the waiting list. Hamilton, vol. 2 at 65-67. However, the Court also notes from the affidavits of Johanson and Hamilton that Hopwood had little likelihood of acceptance from a waiting list. In fact, Hamilton specifically stated, "It is my belief that Ms. Hopwood [would] not have been admitted off the waiting list at a later time." D-333 at A-39.

B. Kenneth Elliott

Kenneth Elliott applied with a TI of 197, representing a GPA of 2.98 and an LSAT score of 167. Elliott's application indicates he received a B.B.A. in accounting from the University of Texas in 1984, is a certified public accountant, and has worked as an auditor or examiner for state agencies since receiving his undergraduate degree. P-153. In addition to his personal statement, Elliott's file contains two letters of recommendation from employment supervisors.

In the discretionary zone of nonminority applicants, Elliott's file was reviewed by a subcommittee of three that included Johanson. D-332 at A-33. Elliott received no votes, and the law school sent him a denial letter dated April 11, 1992. P-153. In July 1992, Elliott's father wrote a letter to Dean Mark Yudof in which he requested that Elliott's application for admission be reconsidered. P-165. Elliott's father further stated that Elliott did not know he was writing the letter and that Elliott's "friends and family all feel that he was not accepted to U.T. because of limited openings at U.T. due to mandatory minority and women quotas which use a large percentage of the openings."[44] The dean referred the letter to Hamilton, who informed Elliott's father that although she was not at liberty to discuss Elliott's application, she would pursue the matter with Elliott if Elliott felt he had been treated unfairly. *Hamilton*, vol. 2 at 67. Hamilton testified she telephoned Elliott, told him she

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[44] P-165. The only copy of the letter in the record is an unsigned draft provided by the plaintiffs. Hamilton testified that the letter actually received by the law school had been administratively misplaced since the summer of 1992. *Hamilton*, vol. 2 at 68-69.

had received a letter on his behalf, and invited him to come to her office to visit. *Id.* at 67-68. Hamilton testified Elliott canceled the first appointment and she scheduled a second appointment, which she canceled. Hamilton testified she subsequently called him back and told him she was placing him on the waiting list.[45] Elliott, however, testified he had no further conversations with anyone at the law school after the failed meetings and did not know he had been placed on the waiting list. *Elliott*, vol. 7 at 21.

Hamilton testified that on August 24, she decided to grant Elliott an offer of admission, left a message on his answering machine, and instructed admissions personnel to continue to try to reach him. *Hamilton*, vol. 2 at 58-59. Hamilton stated that approximately a week later, after classes had begun, Elliott returned her call but indicated it was impossible for him to attend school at that time. *Id.* at 59-60. However, in Hamilton's affidavit, submitted to this Court as part of the pretrial motions, Hamilton stated that Elliott never responded to her phone calls. D-447 (Supp.Decl. of Hamilton at 3). Further, Elliott's file contains no letters either notifying him of his placement on the waiting list or his admission to school, despite the existence of such documentation for others offered admission from the waiting list late in the process.

The Court finds that Elliott had to have realized, at minimum, his application was under reconsideration when an assistant dean initially contacted him. However, being offered a position on the waiting list, as the Court has already found, is not equivalent to admission. To determine whether Elliott actually received an offer of admission, the Court must evaluate the conflicting testimony of Elliott and Hamilton. The discrepancies in Hamilton's affidavit and trial testimony, as well

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[45] *Id.* Johanson testified it was "quite unusual" for someone to be reconsidered and placed on the waiting list without Johanson's awareness of the decision. *Johanson*, vol. 5 at 19-21. He testified he knew nothing about Elliott being placed on the waiting list. *Id.*

as the law school's lack of documentation of Elliott's status, weigh in Elliott's favor.[46] Accordingly, the Court finds that Elliott was not notified of his admission to law school.

In 1992, Elliott also applied to Baylor School of Law and Texas Tech School of Law. He was denied admission to Baylor. Although accepted at Texas Tech, a state university, Elliott declined the offer of admission by letter dated June 2, 1992. *See* D-401.

C. Douglas Carvell

Douglas Carvell had a TI of 197, which was based on an undergraduate GPA of 3.28 and an average LSAT score in the 76th percentile.[47] His application reflects that in 1991 he received his B.A. in political science from Hendrix College in Conway, Arizona. P-151. The LSDAS report indicates Carvell ranked 98th in his class of 247 at Hendrix College. P-151; D-336 at A-49. Carvell provided detailed responses to the application questions on typewritten attachments to his application. Carvell's file included three letters of recommendation, one from a professor at Hendrix College that compliments his intellectual abilities but describes his performance as uneven, disappointing, and mediocre. P-151.

Because Carvell's TI placed him in the nonminority discretionary zone, his file was reviewed by a subcommittee of three. He received no votes from the two faculty members on

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[46] The Court is not implying that Hamilton testified in an untruthful manner. However, because of the number of applicant files Hamilton was required to address and the time pressures under which she was working as the beginning of the school year approached, the Court believes it very possible her recall of the chronology of specific events may be inaccurate.

[47] Carvell's application reflects that he took the LSAT twice, receiving a score of 34 (61st percentile) the first time and a score of 164 (91st percentile) the second time. The LSAT factored in his TI is an average of these two scores.

the subcommittee, Professors Steven Goode and Mark Gergen, but did get one favorable vote from a student member of the committee. *See* D-335, D-336. Therefore, by letter dated April 15, 1992, the law school offered him a position on the waiting list, which he accepted. While he was on the waiting list, Carvell's file was reviewed by Associate Dean Michael Sharlot, a member of the admissions committee. Sharlot did not vote to admit Carvell from the waiting list. D-334 at A-43-A-44. By letter dated July 16, 1992, the law school denied Carvell admission. P-151.

In addition to the law school, Carvell applied for admission to Southern Methodist University School of Law and Vanderbilt School of Law. He was denied admission to Vanderbilt, but was accepted at SMU, where he has completed his first year of law school. *Carvell*, vol. 10 at 6-7. Carvell also applied to the University of Texas School of Business and was denied admission. *Id.* at 12. At SMU, Carvell is pursuing a master's of business administration in a joint program with the SMU law school. *Id.* at 6.

D. David Rogers

David Rogers had a TI of 197 based on his undergraduate GPA of 3.13 and an LSAT score of 166. In the early to mid-1980s, Rogers attended the University of Texas as a student in Plan II, an honors program. However, in 1985, he was dismissed because of his poor scholastic performance. *Rogers*, vol. 11 at 55. Rogers subsequently attended the University of Houston-Downtown and received an undergraduate degree in professional writing in 1990. P-171; *Rogers*, vol. 11 at 56. In 1992, Rogers received an advanced degree in professional writing from the University of Southern California. P-171. Rogers noted on his law school application that "as a white who attended an all-minority school for several years, and who was raised by a single mother, I have an unusual understanding of the challenges faced by women and

minorities." P-171. Rogers's application file contains no letters of recommendation. P-171; *see also* D-335 at A-46-A-47.

Rogers received no votes from any member of the subcommittee that reviewed his file in the nonminority discretionary zone. By letter dated April 7, 1992, he was denied admission to the law school. P-171.

III. DISCUSSION

A. Ripeness and Standing

As a preliminary matter, the defendants contest the ripeness of two of the plaintiffs' claims and the standing of all plaintiffs to bring this cause of action.[48] With regard to Hopwood and Elliott, the defendants argue their claims are not ripe because neither was denied admission.[49] As stated above, the Court has found both Hopwood and Elliott were, in effect, denied admission to the law school. Therefore, a ripe controversy exists between these two plaintiffs and the defendants.

The defendants contend Hopwood lacked standing to challenge the admissions policy because she failed to accept a position on the waiting list or to ask for deferred admission. Therefore, according to the defendants, she has failed to exhaust the administrative procedures available to her. The defendants further contend all plaintiffs lack standing in that none can show

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[48] This matter was addressed at length in pretrial motions and hearings, and the transcripts and evidence related to those motions are evidence in this cause.

[49] As discussed above, the defendants claim Hopwood voluntarily removed herself from the admissions process and Elliott was offered admission.

they would have been granted admission absent the challenged admissions policies.[50]

To have standing to challenge a governmental action, a plaintiff must demonstrate a concrete "injury in fact," a causal relationship between the injury and the challenged conduct, and a likelihood the injury will be redressed by a favorable decision. *Northeastern Fla. Contractors v. City of Jacksonville*, ___U.S. __,___ -___, 113 S.Ct. 2297, 2301-02 (1993). However, the "injury in fact" in an equal protection case involving a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group is the denial of the equal treatment and not the ultimate inability to obtain the benefit. *Id.* at ___, 113 S.Ct. at 2303.

The defendants assert this exception to requiring plaintiffs to show a direct causal relationship is limited in its application to challenges to the validity of express set-asides or reservations such as those addressed in *City of Jacksonville* and *Bakke*. The Court does not read the requirements for standing set forth in *City of Jacksonville* to be limited in the manner defendants contend. In defining standing as applied in equal protection cases, the Supreme Court reviewed its precedent on the issue. The overarching proposition of the cases the Supreme Court cited in reaching its holding was not that the causal-connection exception applied only to specific set-asides, but that an "injury in fact" stemmed from any governmental barrier that either created a discriminatory obstacle or had the effect of producing unequal access to a governmental benefit.[51] Accordingly, the Court finds all the plaintiffs have standing--they have sufficiently

[50] With regard to Elliott, the defendants contend he lacks standing to challenge the initial decision to deny him admission.

[51] *See id.*___ U.S. at 2302-03 (discussing *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836 (1982); *Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978); and *Turner v. Fouche*, 396 U.S. 346, 90 S.Ct. 532 (1970)).

alleged that the law school's admission process is the cause of their injury and that a judicial order could redress the injury.[52]

B. Standard of Review

Affirmative action plans based on race trigger strict judicial scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721 (1989); *see also Bakke*, 438 U.S. at 291, 98 S.Ct. at 2748 (Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). Further, "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 106 S.Ct. 1842, 1846 (1986); *see also Croson*, 488 U.S. at 494, 109 S.Ct. at 722 (reaffirming equal protection analysis is not dependent on the race of those burdened or benefited by a classification).

The defendants contend, however, strict scrutiny is inappropriate in this cause in light of the Supreme Court's holding in *Metro Broadcasting v. FCC*, 497 U.S. 547, 110 S.Ct. 2997 (1990). In *Metro Broadcasting*, the Supreme Court held that affirmative action plans adopted pursuant to federal mandates are subject to intermediate scrutiny--a determination whether the plans serve important governmental objectives and whether they are substantially related to the achievement of the objectives. *Id.* at 565, 110 S.Ct. at 3009. The defendants contend that the Texas Plans equate to a federal mandate because

[52] Further, the law school's 1992 procedure for review of applicants in the discretionary zone effectively prevents any nonminority candidate from establishing that he or she would have been admitted but for the preference given to minority applicants. *See infra* note 86.

they stem from the OCR's insistence on full compliance with Title VI, an objective that is within the power of Congress.[53]

The Court finds the argument unpersuasive. In *Metro*, the FCC's minority ownership programs had been specifically mandated and approved by Congress. *Id.* at 563, 110 S.Ct. at 3008. While it is true that Congress has the power to identify and redress the effects of discrimination and has charged the DOE with assuring compliance with Title VI, there is no similar congressional mandate in this cause. Further, the FCC is a licensing body that, pursuant to a congressional mandate, established specific minority ownership policies. The OCR has provided Texas with a number of suggested tools Texas may implement to bring the higher educational system into compliance with Title VI; it has not, however, required the State to adopt any specific procedures. Although the defendants characterize the law school's efforts as pursuant to an OCR "consent decree," the evidence reflects that, to date, the State of Texas' efforts to comply with Title VI have been made voluntarily in an effort to avoid a specific mandate or the loss of federal funding. *Ashworth*, vol. 13 at 34, 39.

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[53] The defendants also contend a suit against the State of Texas or the University of Texas is an impermissible collateral attack on OCR programs and regulations and, in support of this proposition, cite *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954, 111 S.Ct. 2261 (1991). However, in this cause the plaintiffs are not attempting to challenge a federal statute creating minority business set-asides by challenging the State's role in the program. Instead, the plaintiffs in this cause are challenging the specific procedure the law school voluntarily designed and implemented to achieve affirmative action goals suggested by OCR. The constitutionality of the law school's procedure is not dependent on whether the OCR can require affirmative remedies for a Title VI violation. *See Podberesky v. Kirwan*, 764 F.Supp. 364, 374 (D. Md. 1991), *rev'd and remanded*, 956 F.2d 52 (4th Cir.1992), *on remand*, 838 F.Supp. 1075 (D. Md. 1993).

Further, under equal protection analysis, the same level of scrutiny applies to race-conscious affirmative action plans adopted pursuant to consent agreements as to other voluntarily adopted plans. *See, e.g., In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1501 (11th Cir. 1987), *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180 (1989) (Title VII consent decree). Indeed, the most recent circuit court opinion analyzing an affirmative action plan in the education context, specifically a scholarship plan adopted in response to protracted litigation and OCR guidelines, upheld the lower court's application of strict scrutiny as the proper standard for review of the plan. *See Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992).

The most compelling justification for application of strict scrutiny in this context is to provide assurance that individual rights are afforded the full protection they merit under the Constitution. Only by applying strict scrutiny can a court honestly weigh the validity and necessity of efforts to remedy past wrongs against the rights of otherwise qualified nonminorities affected by the efforts. Although the use of racial classifications is disfavored, there are instances when such classifications serving proper purposes should be upheld. Only through diligent judicial examination can a court determine if a classification is consistent with constitutional guarantees and not related to "illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493, 109 S.Ct. at 721. Accordingly, the Court concludes the law school admissions process must be subjected to a strict scrutiny test under the Equal Protection Clause of the Fourteenth Amendment to protect both the integrity of the process and the important individual rights at issue.[54]

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[54] As an additional point, even if the Court were to find intermediate scrutiny to be the proper standard of review, the Court would still be required to assess whether the process imposed *undue* burdens on nonminorities. *See Metro Broadcasting*, 497 U.S. at 596-97, 110 S.Ct. at

B. Application of Strict Scrutiny

Strict judicial scrutiny involves a determination of whether the law school process served "a compelling governmental interest" and whether the process is "narrowly tailored to the achievement of that goal." *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S.Ct. 1842, 1847 (1986). The purpose of ascertaining whether a compelling governmental interest exists is to "smoke out" illegitimate uses of race by ensuring that the goal is important enough to use the suspect tool of racial preference. *Croson*, 488 U.S. at 493, 109 S.Ct. at 721. The narrowly tailored analysis "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

1. Compelling Governmental Interest.--Both sides expended considerable time and effort at trial on the issue of whether a compelling governmental interest existed sufficient to justify the need for the law school's affirmative action program. The defendants offered a number of reasons as justification for the law school's affirmative action program. These reasons are set forth in the law school's "Statement of Policy on Affirmative Action": [55]

3026 ("[A] congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities."). As discussed *infra* pp. 58-67, the burden imposed upon nonminorities by the law school's admissions procedure is a very troubling aspect of the process and, ultimately, in this Court's view, renders the process constitutionally impermissible.

[55] This written articulation of the purposes and policy of the law school's affirmative action program and description of the 1992 process was prepared in February 1994. *Johanson*, vol. 6 at 45-46; *Yudof*, vol. 20 at 30-31.

> To achieve the School of Law's mission of providing a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission to members of the two largest minority groups in Texas, Mexican Americans and African Americans;
>
> To achieve the diversity of background and experience in its student population essential to prepare students for the real world functioning of the law in our diverse nation;
>
> To assist in redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas;
>
> To achieve compliance with the 1983 consent decree entered with the Office of Civil Rights of the Department of Education imposing specific requirement for increased efforts to recruit African American and Mexican American students;
>
> To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralist diversity in the law school's student population.

D-362. Although all are important and laudable goals, the law school's efforts, to be consistent with the Equal Protection Clause, must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices. *See Bakke*, 438 U.S. at 313; 98 S.Ct. at 2760 (environment fostering robust exchange of ideas makes goal of diversity "of paramount importance in the fulfillment of [a university's] mission"); *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064 (1987) ("The government unquestionably has a compelling interest in remedying past and present discrimination by a state actor."); *Podberesky*, 956 F.2d at 57 (race-related remedy may

be used in attempt to remedy effects of past discrimination). Accordingly, the Court will evaluate the program in light of these goals.[56]

The plaintiffs do not dispute that under the holding of *Bakke*, obtaining the benefits that flow from a racially and ethnically diverse student body is a compelling interest justifying the use of racial preferences.[57] Nevertheless, the plaintiffs suggest that under more recent Supreme Court decisions, the only compelling interest recognized for race-conscious programs is remedying the past effects of racial discrimination.[58] However, none of the recent opinions is factually based in the education context and, therefore, none focuses on the unique

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[56] Notwithstanding the personal views of this judge, it appears the goal of increasing the number of minority members in the legal profession and judiciary of Texas is not a legally sufficient reason to justify racial preferences under fourteenth amendment analysis. *See Croson*, 488 U.S. at 496-98, 109 S.Ct. at 723-24. Further, the desires and goals of a private entity such as the ABA or AALS, though important considerations for an accredited law school, do not provide sufficient justification for racial classifications. Similarly, Texas' "consent decree" with the OCR, though having evidentiary value in terms of past discrimination in Texas' higher education system, is not, in and of itself, a valid justification.

[57] The plaintiffs do contend the law school's affirmative action program is not narrowly tailored to meet the objective of diversity, an issue the Court will address below.

[58] In support of this proposition, the defendants cite *Croson*, 488 U.S. at 493, 109 S.Ct. at 722 ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to politics of racial hostility."), and dissenting opinions from *Metro Broadcasting* and *Johnson v. Transportation Agency, Santa Clara, California*. *See Metro Broadcasting*, 497 U.S. at 613-15, 110 S.Ct. at 3035 (O'Connor, J., dissenting); *Johnson*, 480 U.S. 616, 673-75, 107 S.Ct. 1442, 1473-1474 (Scalia, J., dissenting).

role of education in our society.[59] Absent an explicit statement from the Supreme Court overruling *Bakke*, this Court finds, in the context of the law school's admissions process, obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications.

The defendants presented evidence, which included the testimony of deans from law schools across the country and the testimony of former and current law students, that the benefit to the law school educational experience derived from a diverse student population is substantial. *See*, e.g., *Brest*, vol. 22 at 22-23; *Stein*, vol. 18 at 20-21; *Bollinger*, vol. 16 at 23-26; *Spector*, vol. 15 at 9-10. Additionally, several professors testified regarding the educational benefit of having a diverse group of students in the classroom setting. *See*, *e.g.*, *Goode*, vol. 9 at 20-21; *Yudof*, vol. 21 at 59-60. According to the evidence presented at trial, without affirmative action the law school would not be able to achieve this goal of diversity. Had the law school based its 1992 admissions solely on the applicants' TIs without regard to race or ethnicity, the entering class would have included, at most, nine blacks and eighteen Mexican Americans.[60]

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[59] The Supreme Court recognized the vital role education plays in our society in *Brown v. Board of Education*:

> [Education] is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Educ., 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954).

[60] D-441. The Court believes such meager representation would be woefully inadequate in a state university supported, in part, by revenues from *all* state residents. Further, the Court concurs with the defendants that diversity requires more than token representation of minorities; strict reliance

Although under current law the goal of diversity is sufficient by itself to satisfy the compelling governmental interest element of strict scrutiny, the objective of overcoming past effects of discrimination is an equally important goal of the law school's affirmative action program. The plaintiffs have asserted that any past discrimination against blacks occurred so long ago, it has no present effects and that the law school has never discriminated against Mexican Americans.[61] The plaintiffs further assert the Court should limit its review of past discrimination to official acts and policy of the University of Texas law school and should not consider discrimination in Texas' educational system as a whole. As support for this contention the plaintiffs cite *Croson*, in which the Supreme Court struck down a city set-aside program that required thirty percent of city contracts to be subcontracted to minority businesses. 488 U.S. at 499, 109 S.Ct. at 724 ("Like the claim that discrimination in primary and secondary school justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

Recently, however, the Supreme Court held that a system of higher education is under an affirmative duty to eliminate every vestige of racial segregation and discrimination in its educational system and to reform those policies and practices that required or contributed to separation of the races. *United States v. Fordice*, __U.S.__,_ _, 112 S.Ct. 2727, 2743 (1992).

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on the TIs for admission would not further the goal of diversity.

[61] The plaintiffs' expert, James Armor, a senior fellow at the Institute of Public Policy, George Mason University, in Fairfax, Virginia, testified there are no present direct effects of past discrimination in Texas' educational system. *Armor*, vol. 10 at 45-48. Armor testified the only cities in Texas he has visited are Dallas and Houston. *Armor*, vol. 11 at 41. The Court does not find Armor to be a credible witness.

Thus, it appears the Supreme Court has recognized that the restrictions it has applied in ascertaining the present effects of past discrimination in the employment context, specifically the prohibition against remedying effects of "societal discrimination" and discrimination implemented by another governmental unit, are not appropriate in the education context. *See also Podberesky v. Kirwan*, 838 F.Supp. 1075, 1098 & n. 79 (D. Md. 1993). "Applicants do not arrive at the admissions office of a professional school in a vacuum," and, in fact, have ordinarily been students in an educational system for sixteen years. *Geier v. Alexander*, 801 F.2d 799, 809 (6th Cir. 1986). The Court believes, therefore, the residual effects of past discrimination in a particular component of a state's educational system must be analyzed in the context of the state's educational system as a whole. The State's institutions of higher education are inextricably linked to the primary and secondary schools in the system. Accordingly, this Court has not limited its review to the law school or Texas' higher education system in evaluating the present effects of past discrimination.[62] However, were the Court to limit its review to the University of Texas, the Court would still find a "strong evidentiary basis for concluding that remedial action is necessary." *Podberesky v. Kirwan*, 956 F.2d at 55.

As discussed above, Texas' long history of discrimination against blacks and Mexican Americans in public education is chronicled in court opinions, the findings of the OCR, and the

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[62] *See also Ayers v. Allain*, 893 F.2d 732, 751 (5th Cir. 1990): *Brown* states that the stigmatizing effects of segregation are not created by legally compelled attendance but rather from the vestiges of legally compelled separation. Thus the lesson of *Brown* is that the malignancy of apartheid does not vanish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral.

continuing desegregation suits against the State.[63] The State of Texas engaged in overt discrimination against blacks until the practices were forcibly dismantled in the relatively recent past. Discrimination in education was at the center of official discrimination against black Texans. Additionally, the University of Texas has a history of racial discrimination.

Similarly, the State has subjected Mexican Americans to discriminatory practices in the education area as reflected in the findings of unlawful *de jure* discrimination in the numerous desegregation lawsuits. Less documentation exists of overt official discrimination against Mexican Americans than against blacks at the University of Texas. However, the legacy of Texas' discriminatory practices continues to hinder the University of Texas' efforts to attract qualified Mexican American students.

In recent history, there is no evidence of overt officially sanctioned discrimination at the University of Texas. The evidence reflects that the university has made genuine efforts in the last decade to end discrimination by recruiting and maintaining minority faculty members and students and condemning racial incidents occurring on campus or involving student organizations. Despite these efforts, however, the legacy of the past has left residual effects that persist into the present. The evidence presented at trial indicates those effects include the law school's lingering reputation in the minority community, particularly with prospective students, as a "white" school; an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities.

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[63] *See, e.g., League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 878, 127 (1994) ("Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute....").

The university's efforts to recruit minorities has led to a modest increase in the number of minorities attending the law school. However, admissions and recruitment personnel face difficulties in attracting qualified minorities to enroll in the law school. These difficulties stem from negative perceptions of the racial climate at the law school as a result of past discrimination.[64] Because of the law school's legacy of discrimination, it must overcome a perception that it is a "white institution." *Wright*, vol. 19 at 33-34. Recent racial incidents, although not officially sanctioned by the school, have reinforced the perception that the university is hostile to minorities and has hurt its ability to recruit minority students. *Wright*, vol. 19 at 29-31. An affirmative action program is therefore necessary to recruit minority students because of the past discrimination.

The effects of the State's past *de jure* segregation in the educational system are reflected in the low enrollment of minorities in professional schools, including the law school. The OCR findings and the OCR's continuing review of Texas' efforts to desegregate demonstrate the pervasive nature of past discrimination in the higher education system.[65] As a result of policies of official discrimination in the Texas higher education system, a generation of blacks and Mexican Americans who are the parents of those presently of law school age were denied meaningful opportunities for higher education. *Glenn*, vol. 23 at 51-53; *Romo*, vol. 17 at 63-64; *Wright*, vol. 19 at 45-47.

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[64] *Hamilton*, vol. 2 at 49-50, 52-53; *Wright*, vol. 19 at 33-36. *Sweatt v. Painter* is often studied in undergraduate courses and contributes to undergraduate minorities' perception of the University of Texas as an institution that does not welcome minorities. *Wright*, vol. 19 at 33-36; *Romo*, vol. 17 at 64.

[65] The plaintiffs contend the OCR's findings are invalid because the OCR did not apply the standards recently set forth by the Supreme Court in *Fordice*. However, neither the validity of the OCR investigation, nor the retroactive application of *Fordice* is the issue before this Court.

The denial of these opportunities to the generation of minority parents bears a causal connection to the diminished educational attainment of the present generation. *Glenn*, vol. 23 at 51-52; *Romo*, vol. 17 at 53-54.

Further, many public schools in Texas continued to have a substantial degree of racial and ethnic segregation during the 1970s and 1980s, the decades in which the majority of 1992 law school applicants attended primary and secondary schools. *Glenn*, vol. 23 at 48-51; D-379. This segregation has handicapped the educational achievement of many minorities. The ultimate effect of the inferior educational opportunity, combined with the lower socioeconomic status of minorities in Texas, is a disproportionately smaller pool of minority applicants to law school. D-379 at 6-7; *see also supra* note 3.

In addition, some minority students enrolled in the law school feel isolated even with the current commitment to affirmative action and diversity and are often hesitant to participate in class discussion when they are the sole minority or one of a few minorities in a class. *Longoria*, vol. 15 at 32-34; *Rodriguez*, vol. 17 at 24-25. Some minority students continue to perceive a hostile racial environment on the campus, which they assert is reflected in insensitive comments by fellow students and faculty. *Bell*, vol. 14 at 16, 29-34; *Escobedo*, vol. 14 at 41-42; *Longoria*, vol. 15 at 32-24.

Accordingly, despite the plaintiff's protestations to the contrary, the record provides strong evidence of some present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole. Therefore, the Court finds the remedial purpose of the law school's affirmative action program is a compelling governmental objective.

2. *Narrowly Tailored.*--The Court must next decide if the admissions process was narrowly tailored to achieve the goals of diversity and overcoming the present effects of past discrimination. This determination requires the application of four factors: the efficacy of alternative remedies; the flexibility

and duration of the relief; the relationship of the numerical goals to the percentage of minorities in the relevant population; and the impact of the relief on the rights of third parties. *See United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066 (1987).

The defendants have shown it is not possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates. *Brest*, vol. 22, at 15. As stated above, in 1992, the entering class would have included at most nine blacks and eighteen Mexican Americans, had the review of minorities been limited to those applicants in the presumptive admit and discretionary zones for white applicants. D-441; *Yudof*, vol. 21 at 44; *Johanson*, vol. 6 at 38. These numbers reflect the maximum potential and assume no adverse affect on the number of applicants stemming from the abandonment of affirmative action.

Further, the record indicates the ultimate effect of abandoning affirmative action at the law school would be to redirect minorities to the historically separate state law school at Texas Southern University, thereby resegregating the law school.[66] Alternatives, such as minority scholarships and increased minority recruitment, while effective tools in conjunction with the affirmative action program, would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect

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[66] *Ashworth*, vol. 12 at 44-45; D-432; D-453; D-454. In 1971, the year following the Board of Regents disapproval of the law school's participation in the CLEO program, the law school entering class had no blacks. As late as 1974 only ten of the law school's 1600 students were black. *Wright*, vol. 19 at 31-33. Texas Southern University, the law school Texas created to avoid integration of the law school, enrolls almost 50% of all entering minority law students in Texas. This percentage would increase dramatically in the absence of the law school's affirmative action program. *Wright*, vol. 19 at 21-22; *Ashworth*, vol. 12 at 44-45; D-432; D-452; D-453.

of past *de jure* segregation. In fact, the record in this case demonstrates that, without affirmative action, the perception of the law school as a "white" institution would be exacerbated, which would compound the difficulties of attracting top minority students. *Wright*, vol. 19 at 36-37; *Goode*, vol. 9 at 19; *Rodriguez*, vol. 17 at 25.

The evidence shows that despite genuine efforts to end discrimination, the legacy of the past continues to hinder the law school's efforts to attract highly qualified minority students. Accordingly, the Court finds affirmative action in the law school's admissions program is an effective and necessary means to overcome the legacy of the past and to achieve the diversity necessary for a first-class university.

The plaintiffs argue the admissions program establishes the functional equivalent of an impermissible quota system in which the law school attempts to camouflage quotas through the use of the term "goals." The plaintiffs contend because the admissions committee knows the approximate number of students in an incoming class, the five percent black and ten percent Mexican American figures translate into specific numbers.

The admissions data from the past ten years shows variations in the admission figures for the two groups receiving admissions preferences at the law school -- blacks and Mexican Americans. The data reflects that between 1983 and 1993, the percentage of black admissions varied from a low of 3.2 percent, occurring in 1987, to a high of 9.3 percent in 1983. The percentage in 1992 was 8.0 percent. Mexican American admissions varied from a low of 10 percent, occurring in both

1983 and 1993, and a high of 14.3 percent occurring in 1984. The percentage in 1992 was 10.7.[67]

An illegal quota, as defined by the Supreme Court, exists when a fixed number of seats are set aside or an unyielding number is set to achieve a goal. *See Bakke*, 438 U.S. at 288, 98 S.Ct. at 2747 (defining quota as fixed number of seats set aside); *see also Metro Broadcasting*, 497 U.S. at 599, 110 S.Ct. at 3027 (equating quota with a "fixed quantity set aside"); *Croson*, 488 U.S. at 499, 109 S.Ct. at 724-25 (describing thirty percent minority set-aside as rigid and unyielding quota); *Fullilove v. Klutznick*, 448 U.S. 448, 498, 100 S.Ct. 2758, 2785, 65 L.Ed.2d 902 (1980) (equating quota with set-aside). Though it is evident from the admissions figures that the percentages of desired minorities in a class derived from the OCR investigation served as guidelines, the law school did not rigidly and inflexibly apply the numbers. Instead, the percentages fluctuate randomly, albeit within a relatively narrow range, and show no consistent pattern of increase. In some years, the law school has failed to meet its goals because of the relatively weak strength

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[67] The admissions data from 1983 to 1993 reflects the following minority admissions, both in percentages and actual numbers of students:

Year	Black	Mexican American
1983	9.3 (47)	10.0 (51)
1984	6.2 (32)	14.3 (74)
1985	4.6 (25)	11.2 (61)
1986	4.4 (24)	13.1 (71)
1987	3.2 (17)	10.2 (55)
1988	7.0 (44)	10.7 (60)
1989	6.0 (35)	11.4 (58)
1990	7.1 (39)	11.6 (64)
1991	6.9 (35)	10.6 (54)
1992	8.0 (41)	10.7 (55)
1993	5.9 (31)	10.0 (53)

D-71.

of the minority applicant pool. *Goode*, vol. 9 at at 13-17. No evidence was presented at trial that the law school g granted a set-aside for any particular group or that competitition for any specific seat in the class was closed to some studenents because of race or ethnicity.[68] Accordingly, the Court finfinds the 1992 admissions process did not use an illegal quota but it was, in fact, flexible in achieving its goals based on the strtrength of the minority applicant pool.

As for duration, the law school has not statated precisely how long it envisions maintaining its affirmmative action admissions program. However, in the 1990s, as s the minority applicant pool improved, the admissions committittee made the decision not to admit greater numbers of minorityty students but to attempt to close the gap in credentials of r minority and nonminority students. *Wellborn*, vol. 24 at 31-35; ; *Goode*, vol. 9 at 7, 17-18. Therefore, in 1992, despite a signifificant increase in the number of minority applicants from the prerevious years, the law school's minority admissions remained relatatively stable. *Johanson*, vol. 6 at 13-14; P-47; D-438; D-439.9.

The current objective of the law school, as a articulated at trial, is to continue to narrow the gap to the : point where affirmative action will not be required to o achieve a representative percentage of minorities in the enteriring classes.[69] The evidence reflects that the law school admissions committee

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[68] The law school maintains racially segregated "waiait lists," which the plaintiffs contend the law school uses to adjust the racial d composition of the incoming class to meet its goals. However, the evidence a at trial showed that there is no "last seat," as in *Bakke*, for which an applicant's race is the deciding factor. *See, e.g., Johanson*, vol. 4 at 43.

[69] *See Goode*, vol. 9 at 32 ("My position on the e committee for many years has been, we ought to work and strive to decreasingng the gap, little by little if we have to, but one day to the point where, in fact, ', we won't have such a gap, where we can truly have a race-blind system of admission. We're not there."); *see also Wellborn*, vol. 24 at 35; P-1.

regularly reviews and adjusts the remedy to evaluate its necessity and efficacy.[70] Certainly, an indefinite program would violate the Equal Protection Clause. However, the law school's use of the program until the OCR has determined Texas is in compliance with Title VI and until the gap in minority and nonminority credentials has narrowed such that the State will remain in compliance with Title VI without the need for affirmative action does not offend the Constitution. *See Podberesky*, 764 F.Supp. at 376.

The third factor, the relationship of the numerical goals to the relevant population, is easily satisfied under these facts. The law school has not attempted to set goals that reflect the percentage of minorities in the general population or the percentage of minorities attending college. Instead the law school's goals for minority enrollment are generally in line with the percentages of black and Mexican American college graduates in the State of Texas. These goals stem from the OCR investigation and the resulting Texas Plans. *Goode*, vol. 9 at 12-13; *Johanson*, vol. 4 at 9-12. They are reasonable and logically related to the size of the relevant pool of minority prospects for higher education.

The final factor, the impact of the procedure on the rights of innocent third parties, is the most difficult to evaluate. By definition, if one person is given preferential treatment based on race or ethnicity to overcome a heritage of past societal wrongs, another person is penalized. However, the person penalized or that person's ancestors may never have discriminated against the preferred race or ethnicity. Although the past history of societal discrimination in certain institutions may justify the remedy, in the end, individuals pay the price. Therefore, it is imperative

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[70] The evidence shows that the qualifications of minority applicants today are roughly equivalent to the qualifications of nonminority applicants 20 years ago. D-433. These figures demonstrate the progress that has occurred in the qualifications of minorities applying for law school. *Glenn*, vol. 23 at 52.

that the mechanics of any program implementing race-based preferences respect and protect the rights of individuals who, ultimately, may have to sacrifice their interests as a remedy for societal wrongs.

In 1992, admissions subcommittees of three reviewed all the nonminority files. With the exception of Johanson and Hamilton, none of the members of the subcommittees reviewed the individual minority files. Nonminority applicants receiving no votes were denied admission without any further consideration or any direct comparison to minority applicants. In fact, as early as February 28, 1992, the law school had sent denial letters to 201 resident applicants, none of whom were black or Mexican American. P-43. By March 24, 1992, 718 denial letters had been sent to resident applicants, all to nonminority applicants. P-52. The law school did not reject any minority applicants until later in the admissions process. P-60.

The lack of individual comparison between minority and nonminority files resulted primarily from the separate admissions procedures for minorities and nonminorities in the discretionary zone; this is the aspect of the procedure that is at issue with respect to the four plaintiffs in this cause, who were evaluated in the discretionary zone. However, the setting of different presumptive denial lines for minorities and nonminorities creates a similar problem: some nonminority applicants who fell below the nonminority presumptive denial line, though having a higher score than minority applicants placed in the discretionary zone, were rejected early in the process with no comparison to the individual minority applicants.[71] Further, although a

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[71] The use of different presumptive admission lines to identify the top candidates in the different groups does not present the same problem for several reasons. First, the evidence shows that Johanson reviewed all candidates in the top category, both minority and nonminority. Additionally, those applicants that were not offered admission from this category were not denied admission but moved to the discretionary zone. Further, Johanson

presumptive denial score was established for minorities, in 1992, every minority applicant not admitted from the presumptive admit category was treated as if in the minority discretionary zone. P-103.

The defendants defend the system used in 1992 as more effective in controlling the use of race for limited, legitimate purposes than the previous procedure of commingling minority and nonminority files in the stacks of thirty, a procedure that allowed individual reviewers complete discretion on the extent, if any, to implement affirmative action. *Wellborn*, vol. 24 at 8-17. The defendants assert the 1992 process was also more efficient in that minority files were reviewed by the persons most experienced in reviewing and evaluating minority files. *Goode*, vol. 9 at 3. The defendants concede that in 1992, with the exception of Johanson and Hamilton, no members of the general admissions committee reviewed individual minority files. However, they contend that the full committee was sufficiently

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testified to the necessity of making offers of admissions to the top candidates in the minority pools as soon as possible because of the small pool of qualified applicants and the nationwide competition for them. A tool that considers the disparity in past educational opportunity based on historical discrimination to assist in attracting the top minorities does not create an undue burden on the rights of nonminorities when appropriately used. Conversely, the use of differing presumptive denial lines effectively removed some nonminority applicants from consideration early in the process without being provided a general, much less individual, comparison with a fully developed pool of minority applicants. One or two separate reviewers from the general admissions committee unilaterally made determinations with regard to these applicants. However, none of the plaintiffs in this lawsuit was affected directly by this aspect of the 1992 procedure. Further, the new admissions procedure adopted by the law school will no longer use presumptive denial lines to preclude comparison of applicants. *See infra* note 87. The Court, therefore, need not address the issue. If the issue were before the Court, the Court would find this aspect of the procedure suffers from the same infirmity that use of the minority subcommittee created in the discretionary zone--lack of individual comparison between minority and nonminority applicants.

apprised of the relative strengths of the minority and nonminority applicant pools through information provided by the minority subcommittee. Because the minority subcommittee shared this information with the full committee, the defendants argue that the full committee could reach a consensus on the weight to give race in the admissions process and evaluate the nonminority stacks of files with the relative strengths of the applicant pools in mind. *Wellborn*, vol. 24 at 10, 14-16; *Goode*, vol. 9 at 8-9. The defendants also defend the law school's process as consistent with similar processes used at major law schools across the country.[72] However, review of admissions

[72] The defendants imply that because the law school's affirmative action is fundamentally similar to that used at the major law schools around the country, it is constitutional. The evidence, however, reflects that while there are similarities, the other programs differ significantly from that at issue in this cause. Judith Wegner, Dean of the University of North Carolina School of Law, testified by deposition that the University of North Carolina School of Law does not set separate presumptive admission and denial scores based on race, does not have waiting lists segregated by race, and does not have separate committee review based on race. *Wegner depo.* at 48-49. Robert Stein, Dean of the University of Minnesota Law School, testified that the University of Minnesota uses mechanisms in the admissions procedure similar in function to those used by the law school. However, all applicants offered admission at the University of Minnesota, with the exception of those offered "automatic" admission based on high indices, are ultimately reviewed by the full admissions committee. *Stein*, vol. 18 at 12. The minority subcommittee does not have authority to admit applicants, only to recommend specific applicants to the full committee. *Stein*, vol. 18 at 48. Paul Brest, Dean of the Stanford Law School, testified his school uses a system comparable to that used by the law school, with a single admissions chair who has ultimate discretion on all admissions. *Brest*, vol. 22 at 19. Instead of a using a minority subcommittee, Stanford has one person that reviews minority files and makes recommendations to the admissions chair. *Id.* at 8-19. Until recently, that person reviewed only minority files. However, as the result of a recent settlement with OCR, the person began reviewing some nonminority files so that she would have a better sense of the entire pool of applicants and be able to make more appropriate comparisons between the applicants. *Id.* at 39.

procedures for equal protection violations requires a fact-specific inquiry. The fact that other schools may use processes with similar components does not resolve the issue of whether the defendants deprived the four plaintiffs in this cause of equal protection under the law.

In *Bakke*, Justice Powell stated that although race or ethnicity could be a "plus" factor in consideration of a particular applicant, race or ethnicity should "not insulate the individual from comparison with all other candidates for the available seats." *Bakke*, 438 U.S. at 317, 98 S.Ct. at 2762. Justice Powell further discussed the importance of assuring applicants that they were treated as individuals in the admissions process:

> The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 318, 98 S.Ct. at 2762. The defendants contend this express language is limited in its application to only those affirmative action programs that, like the one at issue in *Bakke*, use a quota system to achieve diversity. They assert that Justice Powell's reasoning calling for a one-on-one comparison may have application when the primary objective is to obtain a diverse class based on a number of different qualifications.

However, this reasoning does not apply, according to the defendants, when a primary objective is to remedy past discrimination. In such circumstances, the defendants maintain individuals need not be compared one-to-one, as long as the admissions committee had a generalized knowledge of the strengths of the minority and nonminority applicant pools.[73] The Court disagrees.

Overcoming the effects of past discrimination is an important goal for our society. The preservation and protection of individual rights are equally important. Society must be careful not to ignore the latter to achieve the former, for to do so would serve only to perpetuate actions of the type affirmative action attempts to redress. Two wrongs do not make a right;

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[73] Additionally, the defendants assert that nothing in the case law following *Bakke* suggests that individual comparison of files is required in an admissions process redressing past discrimination, and in fact, indications exist to the contrary. *See Croson*, 488 U.S. at 519, 109 S.Ct. at 735 (Kennedy, J., concurring) (narrow tailoring standards should not be so strict as to chill state's ability to voluntarily eliminate results of past discriminatory actions); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 471, 106 S.Ct. 3019, 3047-48 (1986) (narrow tailoring does not require specific beneficiaries of affirmative action be victims of past discrimination). The defendants assert that requiring a one-to-one comparison of over 4000 applicants a year would be incredibly burdensome. However, the Court finds no reason, when evaluating affirmative action in the educational context, that the protection afforded individuals under the Fourteenth Amendment should change based on the governmental goal that is to be achieved. Further, the defendants, citing *Bakke*, have asserted diversity as a constitutionally valid goal of the law school's affirmative action program. *Bakke* gives no indication that the burden to a school in implementing a constitutionally valid program should be considered as a reason to diminish the need for individual comparison. Additionally, more recent case law has made it clear that administrative convenience cannot support a finding that an affirmative action program is narrowly tailored to remedy the effects of past discrimination. *Croson*, 488 U.S. at 508, 109 S.Ct. at 729-730.

nor does blatant discrimination cure the ills of past discrimination. Indeed, affirmative action that ignores the importance of individual rights may further widen the gap between the races that the law school so diligently attempts to close and create racial hostility. The only proper means of assuring that all important societal interests are met, whether in the context of creating diversity or redressing the ill effects of past wrongs, is to provide a procedure or method by which the qualifications of each individual are evaluated and compared to those of all other individuals in the pool, whether minority or nonminority.

The law school owes a duty to the citizens of Texas to allow access to a legal education to the best qualified applicants. This does not imply that those applicants with the highest numbers or most prestigious pedigrees are necessarily the best qualified. A multitude of factors, as discussed by Justice Powell in *Bakke*, should be considered in developing the best qualified class from a given group of applicants.[74] "Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Id.* at 317-18, 98 S.Ct. at 2762. To achieve the compelling governmental goal of remedying past discrimination, race and ethnicity are factors that deserve "pluses" in the weighing of qualifications. To achieve the compelling governmental goal of diversity, nonobjective qualifications of nonminorities and minorities alike may deserve a similar "plus" factor.[75] Only by comparing the entire pool of

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[74] In addition to race, Justice Powell suggested "[s]uch qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." 438 U.S. at 318, 98 S.Ct. at 2762.

[75] A nonminority applicant from a disadvantaged background, although offered admission to prestigious colleges, who elects to attend less-

individual applicants can both these goals be achieved and the best qualified class of entering law students be admitted.

The law school's 1992 admissions procedure, in theory, was designed to select the best qualified applicants from the thousands of applications it received. In 1992, the law school's affirmative action program involved a determination of those applicants who were the best qualified from the entire minority pool and an attempt to enroll sufficient numbers of those applicants in the entering class to satisfy the compelling governmental objectives at issue. The law school evaluated all nonminority applications through a separate process, with the goal of admitting the best qualified nonminorities. The defendants maintain this bifurcated process does not violate the Fourteenth Amendment because affirmative action is lawful and those minorities selected are evaluated against nonminority applicants by comparison of the general qualifications of the two pools of applicants. The process, however, incorporates no meaningful evaluation between the applicants selected from each pool--a crucial element for protection of individual rights.

The Court holds that the aspect of the law school's affirmative action program giving minority applicants a "plus" is lawful. But the failure to provide comparative evaluation among *all* individual applicants in determining which were the best qualified to comprise the class, including appropriate consideration of a "plus" factor, created a procedure in which admission of the best qualified was not assured in 1992. Under the 1992 procedure, the possibility existed that the law school could select a minority, who, even with a "plus" factor, was not

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prestigious schools for economic reasons but nonetheless performs well, seems to be penalized under the current system for not having financial means or opportunities commensurate with other nonminorities dealt a different lot in life. Therefore, the affirmative action program, as applied in 1992, seems to have had the somewhat ironic effect of affecting the rights of less advantaged and, indeed, even disadvantaged, nonminorities rather than the group of nonminorities as a whole.

as qualified to be a part of the entering class as a nonminority denied admission. Thus, the admission of the nonminority candidate would be solely on the basis of race or ethnicity and not based on individual comparison and evaluation. This is the aspect of the procedure that is flawed and must be eliminated.

The constitutional infirmity of the 1992 law school admissions procedure, therefore, is not that it gives preferential treatment on the basis of race but that it fails to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race.[76] Because the law school's 1992 admissions process was not narrowly tailored, the Court finds the procedure violated the Equal Protection Clause of the Fourteenth Amendment.

C. Effect of Process on Plaintiffs

The next issue the Court must address is whether, but for the manner in which the law school improperly considered race in its 1992 admissions procedure, the plaintiffs would have been offered admission. The defendants argue that the burden is on

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[76] The record shows that two of the plaintiffs' applications were reviewed by members of the minority subcommittee who had familiarity with both pools of applicants, minority and nonminority. Initially, Johanson reviewed Hopwood's file early in the process before the entire pool of applications had developed. After he moved her to the discretionary zone, a subcommittee of three that included Hamilton reviewed her file. Elliott's file was reviewed by a subcommittee of three that included Johanson. Arguably, because Johanson and Hamilton had familiarity with individual minority applicant files, the procedure as applied to these two plaintiffs was not impermissible. However, because the other reviewers on the subcommittees had no familiarity with individual minority files, the Court finds the constitutional violation applies to all four plaintiffs. Additionally, the fact that these plaintiffs were reviewed by persons familiar with the entire pool was an inadvertent effect of Johanson's and Hamilton's dual roles and the random shuffle of the files into reviewing stacks; it did not result from the design of the procedure.

the plaintiffs to prove they would have been admitted. The plaintiffs argue that once they prove a constitutional violation, the burden shifts to the defendants to establish there was no but-for causation between the unconstitutional procedure and the denial of admission to each plaintiff.

Generally, in cases where a plaintiff establishes a constitutional deprivation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the action. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052 (1978) (plaintiff seeking damages for due-process violation must show injuries resulted from denial of due process, not from corresponding justifiable deprivation); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977) (once employee established conduct constitutionally protected, burden shifted to employer to show it would have reached same decision). Justice Powell's opinion in *Bakke* suggests the same holds true in Title VI discrimination suits when evidence of alternative reasons exists. [77] The Supreme Court has recently

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[77] The trial court in *Bakke* placed the burden of proof on Bakke. Therefore, although the court found the Davis program violated Bakke's fourteenth amendment rights, it denied him injunctive relief because he had failed to prove he would have been admitted in the absence of the impermissible program. On appeal, the Supreme Court of California, analogizing Bakke's situation to that of a plaintiff under Title VII, ruled that because Bakke established the university had discriminated against him, the burden of proof shifted to the university to prove that it would not have admitted him in the absence of the special admissions program. *Bakke v. Regents of Univ. of Cal.* 553 P.2d 1152, 1172 (1976). Because the university conceded its inability to carry the burden, the California court ordered Bakke's admission. *Id.* On review, the Supreme Court of the United States noted the burden shift but stated that because the university had not challenged that aspect of the decision, the issue of the proper placement of the burden of proof was not before it for consideration. *Bakke*, 438 U.S. at 280 n. 13, 98 S.Ct. at 2743 n. 13. At the end of his opinion, Justice Powell, affirming the injunction, noted that remanding the case would serve no useful purpose in light of the university's concession that it could not meet the burden imposed upon it by the burden shift. *Id.* at 320, 98 S.Ct. at 2764.

taken the analysis one step further in the context of Title VII discrimination cases and held that the failure of a defendant to produce credible evidence of legitimate nondiscriminatory reasons is insufficient to support a finding of discrimination because the "ultimate burden of persuasion" remains at all times with the plaintiff. *See St. Mary's Honor Ctr. v. Hicks*,___ U.S. ___,_____-, 113 S.Ct. 2742, 2749 (1993). In making this clarification, Justice Scalia stated that a court has no authority to impose liability upon an entity for alleged discriminatory practices unless a factfinder determines, according to proper procedures, that the entity has unlawfully discriminated. *Id.* at ___, 113 S.Ct. at 2751. Courts have borrowed the burden of proof standards formulated for Title VII in deciding claims brought under statutes prohibiting discrimination by educational institutions receiving federal funding. *See*, e.g., *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1404 (11th Cir.1993) (Title VI disparate impact claim). *But see Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir.1993) (Title IX plaintiff bears burden of showing disparity and unmet interest). [78]

The Court finds that the cue in Justice Powell's opinion and the holdings of other constitutional cases suggest that a burden allotment similar to that in Title VII cases is appropriate. Therefore, because the plaintiffs established a prima facie case--

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In distinguishing *Bakke* from *Mt. Healthy City Board of Education v. Doyle*, Justice Powell noted that there was no question that race had been the reason for Bakke's rejection and no record existed in *Bakke* that legitimate alternative grounds for the university's decision existed. *Id.* at 320 n. 54; 98 S.Ct. at 2764 n. 54.

[78] The court in *Cohen* held that the burden shift applicable to Title VII cases should not apply to Title IX cases, a statute similar to Title VI. Among the reasons the court offered were the different scope and purpose of the two statutes and the largely aspirational goal of Title IX in comparison to the peremptory goal of Title VII. 991 F.3d at 902.

they proved the law school's 1992 admissions procedure was constitutionally flawed--the burden shifted to the defendants to establish legitimate grounds for the decision not to admit these plaintiffs, notwithstanding the procedure followed. Unlike the university in *Bakke*, the defendants in this cause did not concede the plaintiffs would have been admitted had their applications been compared on a individual basis to minority files. Instead, they offered legitimate, nondiscriminatory reasons for denying each of the plaintiff's applications. D-332 (Hopwood, Elliott); D-334 (Hopwood, Carvell); D-335 (Carvell, Rogers); D-336 (Carvell). Further, a statistical analysis of the 1992 admissions data supports the defendants' assertion of the non-race based weaknesses in the plaintiffs' applications. D- 338 at A-60--A-71.

The plaintiffs placed in evidence a chart created by the law school that depicts the TIs of all 1992 applicants and whether they were offered or denied admission. *See* P-139. The chart distinguishes minority and nonminority applicants, as well as residents and nonresidents.[79] The chart emphasizes the disparity in TIs between resident minority and nonminority applicants: the highest nonminority TI was 220, the highest black TI was 199 (the same as Hopwood's TI), and the highest Mexican American TI was 208. In the resident nonminority category, of fifty-one applicants with TIs of 199, six were denied admission. Additionally, the law school denied admission to ten nonminorities with TIs higher than Hopwood's TI. With regard to minority applicants with TIs of 199, the

[79] The Court has focused on the statistics for residents in this discussion. The Court notes the chart reflects across-the-board higher numbers for nonresidents and correspondingly more difficult thresholds for admittance.

On the chart, "D" indicates denied, "A" indicates admitted, and "C" indicates canceled. For purposes of evaluation of the numbers, applicants in the "C" category are counted as admissions because they were admitted but canceled the acceptance. *See Johanson*, vol. 6 at 16.

chart shows one black applicant, who was admitted, and three Mexican American applicants, all who were admitted.[80] With regard to a TI of 197, the TI shared by the other three plaintiffs, of fifty-seven resident nonminority applicants, the law school denied admission to nineteen. Only one black resident fell in this category, who was admitted. No Mexican-American applicants had a TI of 197.

On the other end of the scale, out of four black resident applicants with a TI of 185, one was denied admission. However, the law school offered admission to one nonminority resident with the same TI. Applicants with the lowest TI offered admission were all minorities.[81] However, the lowest nonminority TI was only a couple of points higher at 185.

There are many possible methods of evaluating the numbers on the chart and making comparisons of the applicants' relative TIs. The plaintiffs placed the chart in evidence to show their numerical standing above that of the majority of minorities offered admission. The Court agrees with the plaintiffs that the chart shows a significant disparity in TIs between the minority and nonminority pools. But the visual depiction of this disparity further reinforces the Court's finding that the evaluation of applicants must include other nonobjective factors to achieve the compelling governmental interest of overcoming the past effects of discrimination.

What the chart does not prove, however, is that race or ethnic origin was the reason behind the denial of admission to the plaintiffs. Although the plaintiffs had higher TIs than the majority of minority applicants offered admission, the evidence shows that 109 nonminority residents with TIs lower than

[80] Two of the Mexican American applicants canceled.

[81] Of five black applicants with a TI of 183, the law school admitted three; of eleven Mexican American applicants, the law school admitted two (one canceled).

Hopwood's were offered admission.[82] Sixty-seven nonminority residents with TIs lower than the other three plaintiffs were admitted.[83]

Additionally, the Court has reviewed the files of the four plaintiffs as well as the files placed in evidence of other applicants reviewed in the discretionary zone, both minority and nonminority. P-146 to P-150, P-155 to P- 164 (white applicants admitted); P-224 to P-237 (black and Mexican American applicants admitted). Based on the applications in evidence, it appears the majority of applicants, both minority and nonminority, made considerable effort to inform the admissions committee of their special qualifications through extensive answers to the questions on the application form or through personal statements. *See* P-146 to P-150, P-155 to P-163, P-225 to P-237. Most files contained one, if not several, letters of recommendation. *See*, e.g., P-155, 157, 158, 161, 225, 231, 233-236. In fact, of all the applications the Court reviewed, Hopwood's provides the least information about her background and individual qualifications and is the least impressive in appearance, despite her relatively high numbers. The files further reveal that both minorities and nonminorities were offered admission from the waiting lists. *See* P-146, 148, 156, 158, 162 (nonminority); P-231, 285 (minority).

In reviewing these files, the Court appreciates the difficulty of the task facing the admissions committee each year. Evaluation of applications involves both objective and subjective factors, and the Court is aware that some evaluators could use subjectivity to conceal discriminatory motives. As a general rule, however, judges are not as well suited to evaluate qualifications of applicants as those who are familiar with the process and have many years of experience evaluating

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[82] Twenty-nine of these applicants canceled.

[83] Thirteen of these applicants canceled.

applications. *See Odom v. Frank*, 3 F.3d 839, 847 (5th Cir.1993). The Court's review revealed a group of applicants with varying backgrounds and accomplishments, but none so clearly better qualified, in the Court's view, as to require that individual's selection over that of another in the group.[84] The Court sees no disparities in the applications of the admitted minorities when compared to those of the plaintiffs "so apparent as virtually to jump off the page and slap [the Court] in the face." *Id.* Without such a disparity, the Court cannot and will not substitute its views for those of admission committee members with years of experience and expertise in evaluating the law school applications. *See id.*

Therefore, the Court finds the defendants have met the burden of producing credible evidence that legitimate, nondiscriminatory grounds exist for the law school's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process. The plaintiffs, who maintain the ultimate burden of persuasion, have failed to prove otherwise.[85] The Court simply cannot find from

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[84] The Court notes that several of the applicants, some of which, in the Court's opinion, were weaker candidates, initially were denied admission but offered a position on the waiting list. They were offered admission relatively late in the process from the waiting list.

[85] In this cause, the plaintiffs' initial position was that any consideration of race in an admissions procedure is improper. Upon the Court's indication that such a position was untenable under the law, the plaintiffs redirected their efforts to proving the law school improperly used race in the admissions process. However, the plaintiffs' causation evidence consisted of a demonstration that many more minority students were admitted in 1992 than would have been under a strictly race-blind process and that, had the plaintiffs been minorities, there was a high probability they would have been offered admission. *Johanson*, vol. 5 at 37; vol. 6 at 18-19. This evidence, although proof of affirmative action, does not establish that the plaintiffs, who are not minorities, would have received sufficient votes to be

a preponderance of the evidence that the plaintiffs would have been offered admission under a constitutional system.

The Court is mindful that the ultimate burden on the plaintiffs is a difficult and, perhaps, almost impossible obstacle to overcome in a case of this nature. [86] However, the Court may not ignore the precedent of other constitutional cases because, as a practical matter, the burden may be too difficult for plaintiffs to overcome.

E. Relief and Damages

The plaintiffs seek declaratory and injunctive relief, as well as compensatory and exemplary damages. Because the Court has found the admission procedure the law school used in 1992 was not narrowly tailored in that it impermissibly and unnecessarily harmed the rights of the plaintiffs, the Court will enter a judgment providing the plaintiffs with their requested declaratory relief. Specifically, the Court will enter judgment that the law school's use of the separate evaluative processes for

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offered admission if individual minority files had been reviewed by the general admissions committee.

[86] In closing argument, the plaintiffs' counsel stated the plaintiffs could not prove they were denied admission because of their race because it was an impossible burden to meet. T. Smith, vol. 26 at 11, 40. Justice Souter, in expressing concern for Title VII plaintiffs with similar burdens, criticized the holding in *St. Mary's* as establishing a scheme, which, as a practical matter, could never be met by a plaintiff without direct evidence of discrimination. *St. Mary's*, 113 S.Ct. at 2761 (Souter, J., dissenting).

The Court agrees that the plaintiffs have an impossible burden absent direct evidence. However, the difficulty does not stem from the unconstitutional aspects of the procedure alone but from the random shuffle of files into stacks of thirty, with each stack reviewed by different subcommittees of three. Under such a system, it is virtually impossible to establish the outcome of a comparison of the plaintiffs' applications against the other applicants, whether minority or nonminority.

minority and nonminority applicants in the discretionary zone violated the Fourteenth Amendment.

However, "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739, 104 S.Ct. 1387, 1395 (1984). As discussed above, the Court cannot find from a preponderance of the evidence that the plaintiffs would have been admitted under a constitutional system. The Court, therefore, will not order injunctive relief. Nor does the Court find prospective injunctive relief necessary in light of the law school's voluntary change to a procedure, which on paper and from the testimony, appears to remedy the defects the Court has found in the 1992 procedure.[87] Further, neither a plaintiff denied admission under the new system nor evidence of the practical application of the new procedure is before this Court.

Although the plaintiffs have failed to prove an injury-in-fact, they have proved they were deprived of their right to equal treatment. The appropriate relief for a denial of equal treatment in a discriminatory government program is a remedy mandating equal treatment.[88] Therefore, the Court finds it appropriate to

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[87] The law school followed the admissions procedure used in 1992 in 1993 and 1994. However, for selecting the 1995 entering class, the law school has established a new procedure that eliminates the minority subcomittee. D-363. All admissions decisions will be made by a small "administrative admissions group," which will be comprised of Johanson, Hamilton's successor, Dean Tonya Brown, and a faculty member who, as of the trial date, had not been selected. The new procedure will not use presumptive admission and denial scores. *Johanson*, vol. 6 at 34. The law school changed its procedure because "when one gets sued in federal court it catches one's attention." *Id* at 57.

[88] *See Heckler*, 465 U.S. at 740, 104 S.Ct. at 1395. This remedy may be accommodated by an end to preferential treatment of others. *Id.* at n. 8. In the context of affirmative action, the Court interprets this to mean

allow the plaintiffs to reapply to the law school for admission in the 1995 entering class, if they so desire, without requiring them to incur further administrative costs, and for them to be fairly evaluated in comparison to all other applicants for admission in 1995.[89]

In addition, though the plaintiffs did not prove they suffered any other actual injury, the Court will not ignore the gravity of the noneconomic injury to persons denied equal treatment. Therefore, although normally assessed in the context of procedural due-process violations, the Court believes this to be an appropriate case for the assessment of nominal damages:

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. at 266, 98 S.Ct. at 1054. The Court, therefore, will award each plaintiff nominal damages of one dollar.

With regard to general monetary damages, the evidence at trial consisted of each plaintiff's testimony and speculation

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an end to *unlawful* preferential treatment of others.

[89] Because plaintiff Carvell has taken advantage of the opportunity to obtain a legal education at SMU, this aspect of the remedy may have little value to him. Carvell, in all probability, will be a practicing member of the bar long before the other plaintiffs, if offered admission to the law school under a constitutional admissions procedure, obtain law degrees.

about the value of a law degree.[90] Because the plaintiffs have failed to establish that they would have been admitted under a constitutional system, they are not entitled to these damages. Further, had the plaintiffs been entitled to damages, none of them established monetary damages as required under the law and rules of this circuit. *See Haley v. Pan American World Airways*, 746 F.2d 311, 316 (5th Cir.1984) ("A damage award cannot stand when the only evidence to support it is speculative or purely conjectural."). Finally, the Court would not award Title VI damages even were such damages appropriate because the Court does not believe the defendants intended to discriminate against the plaintiffs in an unlawful manner. *See Carter v. Orleans Parish Pub. Schs.*, 725 F.2d 261, 264 (5th Cir.1984) (recovery of damages under Title VI precluded unless action intentional or manifested discriminatory animus); *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356-57 (5th Cir.1983) (same). Indeed, the evidence reflects the contrary. The defendants acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination. The record contains no evidence that the defendants intended to discriminate against or to harm the plaintiffs. Under these facts, an award of damages, especially the punitive damages the plaintiffs request, would be inappropriate.

IV. CONCLUSION

It is regrettable that affirmative action programs are still needed in our society. However, until society sufficiently overcomes the effects of its lengthy history of pervasive racism,

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[90] Elliott testified he thought the median income for recent law school graduates was $57,000 per year. *Elliott*, vol. 7 at 30. Rogers had a somewhat less inflated concept, testifying the average first-year salary for a graduate from the law school was $52,000. Rogers also testified that the defendants had "taken the top off my career" and requested some amount he could not quantify to compensate him for the loss. *Rogers*, vol. 11 at 67.

affirmative action is a necessity. Further, although no one likes employing racial classifications and distinctions, "it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful." *Bakke*, 438 U.S. at 407, 98 S.Ct. at 2808 (Blackmun, J., concurring in part and dissenting in part).

Commitment to affirmative action programs in educational institutions as just and necessary, however, does not imply that the individual rights of nonminorities should fall by the wayside or be ignored. The concern for individual rights requires that programs implementing racial and ethnic preferences be subjected to the most searching judicial examination of strict scrutiny. Only by applying strict scrutiny can the judicial branch assure society that the important individual rights protected by the Fourteenth Amendment have not been unnecessarily and unfairly burdened solely as a function of the color of an individual's skin. The judicial branch must carefully and honestly assess the harm to those individual rights in light of the compelling interests served and benefit bestowed upon society by the affirmative action program. To do otherwise would do little more than, in the words of Justice Kennedy, move us from "separate but equal" to "unequal but benign." *Metro Broadcasting*, 497 U.S. at 638, 110 S.Ct. at 3047 (Kennedy, J., dissenting).

Further, if we wish to progress to a society in which affirmative action is no longer necessary, we must be cognizant of pitfalls and dangers created by affirmative action in the form of the stigma some associate with racial preferences and the potential institutionalization of a process that was designed to overcome institutionalized discrimination. The interests of all require that the government not diminish the importance of individual rights, whether belonging to a minority citizen or a nonminority citizen, through programs, that although well-intentioned, unwittingly "permit the seeds of race hate to be planted under sanction of law." *Plessy v. Ferguson*, 163 U.S. 537, 560, 16 S.Ct. 1138, 1147 (1896) (Harlan, J., dissenting).

The Court realizes that some individuals will continue to complain that any admissions program employing preferences based on race, no matter how carefully designed and administered to provide individualized consideration, deprives nonminorities of their rights. However, when the program functions to overcome the effects of years of discrimination and to serve important societal goals, affirmative action "is consistent with equal protection principles as long as it does not impose *undue* burdens on nonminorities." *Metro Broadcasting*, 497 U.S. at 597, 110 S.Ct. at 3026. The Court believes the only way of assuring an undue burden is not placed on innocent parties in an admissions procedure is to treat *all* applicants as individuals and to consider *all* qualifications in selecting the best qualified candidates to comprise an entering class. Using the color of an applicant's skin to limit the degree of individual comparison between the races neither serves societal goals nor sufficiently protects individual rights under our Constitution.[91]

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91 "The hand that rounded Peter's dome,/ And groined the aisles of Christian Rome,/ Wrought in a sad sincerity./ He builded better than he knew!"

Those who devised the Fourteenth Amendment wrought in grave sincerity. They may have builded better than they knew.

They vitalized and energized a principle, as old and as everlasting as human rights. To some of them, the sunset of life may have given mystical lore.

They builded, not for a day, but for all time; not for a few, or for a race; but for man. They planted in the Constitution a monumental truth ... the golden rule.

Roscoe Conkling, Oral Argument in *County of San Mateo v. Southern Pacific R.R.*, 116 U.S. 138, 6 S.Ct. 317 (1885), *in Oral Argument on Behalf of Defendant by Roscoe Conkling* 34 (1883).

Judgment will be issued consistent with the Court's findings in this opinion.

SIGNED the 19th day of August, 1994.

/s/ Sam Sparks
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed April 4, 1996

No. 94-50569

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY
and
BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

DOUGLAS CARVELL, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY,

AND BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

No. 94-50664

CHERYL J. HOPWOOD, et al.,
Plaintiffs,

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

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DOUGLAS CARVELL, et al.,
Plaintiffs,

DOUGLAS CARVELL,
Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 18, 1996,
1996 WL 120235 (5th Cir.))

Before SMITH, WEINER, and DEMOSS, Circuit Judges.[92]

PER CURIAM:

In No. 94-50569, treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court, and a majority of the judges in regular active service not having voted in favor (*see* FED. R. APP. P. 35 and 5TH CIR. R. 35), the suggestion for rehearing en banc is DENIED.

In No. 94-50664, the court having been polled, at the request of one of the members of the court, on the reconsideration of this cause en banc, and a majority of the judges in regular active service not having noted in favor, rehearing en banc is DENIED.

A dissent from the denial of rehearing en banc is forthcoming and is to be published.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

[92] Judge Emilio M. Garza did not participate in this decision.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed April 19, 1996

No. 94-50569

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY
and
BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

DOUGLAS CARVELL, et al.,
Plaintiffs-Appellees,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees,

VERSUS

THURGOOD MARSHALL LEGAL SOCIETY,

AND BLACK PRE-LAW ASSOCIATION,
Movants-Appellants.

****

No. 94-50664

CHERYL J. HOPWOOD, et al.,
Plaintiffs,

CHERYL J. HOPWOOD, et al.,
Plaintiffs-Appellants,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

****

DOUGLAS CARVELL, et al.,
Plaintiffs,

DOUGLAS CARVELL,
Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

O R D E R:

In No. 94-50664, the defendants-appellees; have moved for a stay of the mandate pending the filing and disposition of a petition for writ of certiorari, pursuant to FED. R. APP. P. 41(b) and 5th CIR. R. 41. The motion is GRANTED IN PART.

The above-cited rule 41(b) provides that the usual length of such a stay is no more than 30 days and that if a certiorari petition is filed within the period of the stay, "the stay will continue in effect until final disposition by the Supreme Court." With this presumptive standard in mind, a stay of 30 days is hereby GRANTED from the date the mandate would have issued without a stay, i.e., 30 days from April 12, 1996. Accordingly, the stay will remain in effect until May 13, 1996 (the 30th day falling on a Sunday, *see* FED. R. APP. P. 26(a)).

The parties are in substantial agreement on the requirements for a stay of mandate pending the filing of a petition for certiorari:

> There must be a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari . . . ; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Baldwin v. Maggio, 715 F.2d 152, 153 (5th Cir. 1983) (internal quotation marks and citations omitted). These standards appear to have been met, to various degrees.

Because of the important of the issue, there is a reasonable chance that four Justices will vote to grant certiorari.

This may be somewhat less likely in light of the absence of a circuit split; because of the Count's recent pronouncements on related issues in such cases as *Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and in light of the Court's recent explanations of how to read "fifth vote" concurring opinions, contained in two opinions issued after the opinion in the instant case, *Seminole Tribe v. Florida,* 116 S.Ct. 1114, 1127-28 (Mar. 27, 1996), and *Rutledge v. United States,* 116 S.Ct. 1241, 1246, 1249 (Mar. 27, 1996).

These recent decisions also suggest a reduced likelihood that the Supreme Court will reverse. The standard speaks, however, in terms of a "significant possibility" rather than a probability or likelihood. In view of the close votes by which the Court has decided cases such as *Adarand* and *J.A. Croson*, the possibility of reversal cannot be overlooked, though the panel majority is confident that the Supreme Court indeed would affirm even if certiorari were granted.

Concerns over irreparable harm flow both ways in this case. In the unanimous view of the panel, the plaintiffs have been, and are being, deprived of their constitutional rights. In another noted case involving international racial discrimination in university admissions, this court, in declining to enter a stay pending Supreme Court review, stated that "[d]enial of a stay is a minor inconvenience to the [state university] defendants. But to allow a stay would subject the successful litigant, [James] Meredith, to the injustice of additional delays." *Meredith v. Fair,* 306 F.2d 374, 378 (Wisdom, J.). Justice Black agreed: "[T]he stays issued in this case can only work further delay and injury to [Meredith] while immediate enforcement of the judgment can do no appreciable harm to the University . . ." *Meredith v. Fair,* 371 U.S. 10, 11 (1962) (Black, Circuit Justice, 1962).

On the other hand, the law school points to the continuing uncertainty and confusion it faces while attempting to conduct an admissions program that is not in conflict with applicable

caselaw. It notes that "[t]he prospect of changes in admissions practices midstream --- which would prejudice students applying at different times for entry into the same academic class -- is real."

Accordingly, it is a close question whether the stringent standards for a stay have been met. The conclusion is that they have indeed been met, but only barely, and the closeness of the call has an impact on the length of the stay.

The defendants request a stay of unspecified length, "pending the filing and disposition of a petition for writ of certiorari." This would permit the defendants the full 90 days allowed by 28 U.S.C. § 2101© and SUP. CT. R. 13.1. Unfortunately, this would only delay resolution of this matter, for the Court would not act on the certiorari petition until, at the earliest, the fall of 1996. On the other hand, the law school is entitled to a reasonable time to prepare its certiorari petition without the distraction of immediate compliance with this court's directives. This is so, not because the decision is in any respect in error, but because, in light of the magnitude of the case, the law school should be able promptly to seek Supreme Court review without immediate re-commencement of proceedings in the district court.

The benchmark of 30 days, contained in rule 41, is appropriate for a stay under the present circuit circumstances. If the petition is filed by that time, and a response is tendered promptly, it may allow time for a Supreme Court's disposition of the petition for writ of certiorari by the time of the Court's recess at the end of June 1996, thus resolving the uncertainty that otherwise would be present until the fall. This is in the interest of both the law school and the plaintiffs and will avoid, at least in part, "the injustice of additional delays" that this court spoke of in *Meredith v. Fair.*

The 30-day stay strikes a balance between the law school's need for time to prepare its petition and the necessity to implement, as soon as possible, this court's mandate to end racial discrimination in admissions at the law school. Of course,

under the terms of rule 41(b). the stay will continue in effect, pending the Court's decision on the petition, if the petition is filed within the 30 days. If the law school fails to file its petition within 30 days, it still may file its petition within the allowed 90 days, but without benefit of a stay from this court.

In summary, the motion for stay of the mandate in No. 94-50664 is GRANTED, but only until May 13, 1996. In No. 94-50569, there is no motion for stay, and accordingly, the mandate shall issue forthwith.

/s/ Jerry E. Smith
United States Circuit Judge

Filed April 23, 1996

Cheryl J. Hopwood, et al. v. State of Texas, et al., No. 94-50569 and 94-50664

POLITZ, Chief Judge, and KING, WIENER, BENAVIDES, STEWART, PARKER, and DENNIS, Circuit Judges, dissenting from failure to grant rehearing en banc

> Soon after the founding of the Republic, the Supreme Court indicated that the power of judicial review should be exercised reluctantly, only because it is essential to the decision of the case before a federal court and because the Constitution and the laws of the United States, as the "Supreme law of the Land." require it.[1]

This case was brought by four individuals plaintiffs (not a class of plaintiffs) who were denied admission to the University of Texas Law School (Law School) in 1992, claiming that the Law School's admission process in 1992 violated the Fourteenth Amendment by giving race-based preferences exclusively to blacks and Mexican Americans.[2] In resolving the case presented by these four plaintiffs, the panel opinion directed the Law School not to use race as a factor in

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[1] Baker v. Wade, 769 F.2d 289, 298 (5th Cir. 19850 (Goldberg, J., dissenting) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed 60 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 4 L.Ed. 97 (1816)).

[2] The Law School no longer employs the system that was in place for 1992.

the admission process at all.[3] In so doing, the opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision, namely, Regents of the University of California v. Bakke.[4] The radical implications of this opinion, with its sweeping dicta, will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation. A case of such monumental import demands the attention of more that a divided panel. It should have the attention of every active judge on this court. We respectfully but emphatically dissent from the denial of rehearing en ban.

For reasons that have not been communicated to this court, and upon which we can only speculate, neither the plaintiffs nor the defendants have sought rehearing en ban. It would appear that in this case, some of our colleagues may have embraced the rationale that, when sophisticated litigants represented by capable lawyers elect not to seek rehearing en banc, it is not our place to take any action. Our customary practice, however, does not support this position. Indeed, not infrequently we propose rehearing en banc on our own motion, before the parties have requested that we do so. We reject out of hand the notion that we are merely obsequious ciphers, subject to the tactical decision and strategic maneuvers of the litigants before us. When the occasional case of such far-reaching importance to this court, to public higher education,

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[3] Judge Smith wrote the opinion for the panel, and Judge DeMoss joined that opinion in full. Judge Wiener, who wrote separately, did not join the panel opinion in this conclusion.

[4] 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)

and to this nation comes down the pike, we have a duty to address it and to do the best possible job that our whole court is capable of, regardless of the tactical decisions of the litigants. To decline to rehear a case of this magnitude because the parties have not suggested that we do bespeaks an abdication of duty--the ducking of a tough question by judges who we know first-hand are made of sterner stuff.

The label "judicial activism" is usually found in the lexicon of those voicing concern about judges whom they perceive to be "liberal," fashioning remedies beyond the scope of what is deemed to be appropriate under the law. Such judicial legislating is generally excoriated as a "bad thing." Hopwood v. State of Texan[5] is a text book example of judicial activism. Here, two members of the three-judge panel determined to bar any consideration of race in the Law School's admission process. This "injunction" is wholly unnecessary to the disposition of the matter appealed and thus is clearly dictum; yet dictum that is a frontal assault on contrary Supreme Court precedent and thus not the kind of dictum we can ignore. By tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling Bakke. We are persuaded that this alone makes the instant case not just en banc-worthy but en bans mandatory.

The Supreme Court has left no doubt that as a constitutionally inferior court, we are compelled to follow faithfully a directly controlling Supreme Court precedent unless

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[5] -- F.3d -- (1996 WL 120235) (5th Cir. 1996).

and until the Supreme Court itself determines to overrule it.[6] We may not reject, dismiss, disregard, or deny Supreme Court precedent, even if, in a particular case, it seems pellucidly clear to litigants, lawyers, and lower court judges alike that, given the opportunity, the Supreme Court would overrule its precedent.

Members of this court have frequently "preached" against such judicial activism. In Williams v. Whitley,[7] Judge Higginbotham explained the limits placed on appellate courts regarding Supreme Court precedent:

> [A]bsent clear indications from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled sub silentio merely because its reasoning and result appear inconsistent with later cases. As [the district court] pointed out . . . the Court issued a reminder to this effect only a few years ago in Rodriguez de Ouijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989): "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." Id. at 484-85, 109 S.Ct. at 1921-22; see also id. at 486, 109 S.Ct. at 1923 (Brennan, J., dissenting) (describing anticipatory overruling as "an indefensible brand of judicial activism") . . . In these circumstances,

[6] See Rodriguez de Ouija v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)

[7] 994 F.2d 226, 235 (5th Cir. 1993).

> our role as an inferior court counsels restraint, even if the result otherwise appears inescapable.

In like manner, our colleagues have routinely counseled that judicial restraint is the order of the day, especially in the constitutional context. For example, in Walton v. Alexander,[8] Judge Garwood insisted that courts have a duty not to address constitutional issues not necessary to the disposition of an individual case.

> [I]t is settled that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979). This "responsibility to .avoid unnecessary constitutional adjudication" is "a fundamental rule of judicial restraint." Three Affiliated Tribes v. World Engineering, 467 U.S. 138, 157, 104 S.Ct. 2267, 2279, 81 L.Ed. 113 (1984). All this, of course, applies not only to the Supreme Court but to lower courts as well. See Bowen v. United States, 422 U.S. 916, 920, 95 S Ct. 2569, 2573, 45 L.Ed. 641 (1975).

[8] 20 F.3d 1350, 1356 (5th Cir. 1994) We cannot but note that a majority of our active judges voted Walton en banc to correct the majority's erroneous interpretation of Supreme Court precedent regarding an issue that was not necessary for the resolution of the case.

Variations of this theme can be found in the opinions of many of the judges of this court.[9]

Thus, it seems that this court has trouble practicing what it preaches, at least in this instance. For here, Justice Powell's opinion in Bakke made the Supreme Court's disposition precedential.[10] We unequivocally reject the proposition that it does

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[9] See also United States v. Mendiola, 42 F.2d 259, 260 n.1 (5th Cir. 1994) (Barksdale, J.) ("It goes without saying that we have a strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration."); Manning v. Upjohn Co., 862 F.2d 545, 547 (5th Cir. 1989) (Smith, J.) ("Principles of judicial restraint dictate that if resolution of an issue effectively dispose of a case, we should resolve the case on that basis without reaching any other issued that might be presented.") Apache Bend Apartments, Ltd. v. United States, 987 F.2d 1174, 1175, (5th Cir. 1993) (Jolly, J.) ("The judicial power to adjudicate constitutional questions is reserved for those instances in which it is necessary for the vindication of individual rights.") (emphasis added); Doe v. Taylor Indep. Sch. Dist., 15 F.D. 443 (5th Cir. 1994) (Jones, J., dissenting, joined by Garwood, Smith, Barksdale, and DeMoss, JJ.) ("'The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in [the constitutional] field.'") (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1192)).

[10] In a part V.C. of his opinion, Justice Powell writes,

> In enjoining [the University of California at Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.

Bakke, 438 U.S. at 318. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell in this holding. Id. at 271 n.*.

not mandate our disposition. The syllogisms tacked together and proffered by the majority opinion as proof that Justice Powell's diversity conclusion is no longer good law do not, under any standards of which we are aware, qualify as an overruling of Bakke.[11] To the contrary, direct reference to Justice Powell's diversity analysis documents, supports, and reinforces its continuing validity.[12] Consequently, even if the members of the panel majority were convinced that the Supreme Court is certain to overrule Bakke, in the absence of an express overruling, they had no option but to grin, follow Bakke, bear it, and patiently await the Supreme Court's reconsideration. Rather than following this universally canon, adhering to our established rules, and applying Supreme Court precedent, the panel chartered a path into terra incognita. Judicial self-restraint was the first casualty; it proved to be too burdensome. The teachings prescribing the consideration of constitutional issues unnecessary to the decision soon followed. With these two limitations adroitly set aside, the panel majority apparently considered itself positioned to overrule Bakke.

Giving the panel majority the benefit of this doubt, as we are wont to do and should do, and assuming arguendo that Bakke's diversity issue had to be addressed n this particular case, would it not have been the more judicious course to have brought our full en banc powers to hear on this difficult, vitally important question? It can hardly be gainsaid that reasonable jurists can and likely will differ on an issue of such magnitude, depth, and importance. Indeed, this very truism compels giving to the entire

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[11] Lest there be any doubt, we are firmly cnvicned that, until the Supreme Court expressly overrules Bakke, student body diver4sity is a compelling governmental interest ofr the purposes of strict scrutiny.

[12] See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (recognizing racial diversity as sufficiently compelling n the context of higher education).

court the opportunity to devote to this crucial case its focused consideration. Conceivably, after an en banc rehearing the panel result, its reasoning, and even its dicta, might be embraced by a majority of the en banc court. But that is not the point; even if that unprecedented and, we suggest, impertinent step--a federal circuit court, sitting en banc, purporting to overrule a Supreme Court precedent--were to be taken, it should not be taken until sixteen of the seventeen active judges of this court[13] had an opportunity to consider and participate in the deliberations on this matter fully.

There are many things which a "yea" vote on an en banc poll is not: It is not necessarily a vote against the analysis; it is not necessarily a vote against the result; it is not necessarily a vote against a panel opinion or in favor of a special concurrence or a dissent. It is rather an affirmative statement that, for one or more reasons, a case or an issue is worthy of the time, attention, and efforts of the entire court. Hopwood is such a case. Unfortunately, a bare majority of our colleagues have joined hands to deny this storied court the opportunity to consider this case en banc.

The majority of the panel overruled Bakke, wrote far too broadly, and spoke a plethora of unfortunate dicta. That was not their prerogative, yet this court declined to reconsider Hopwood en banc. From that decision we must, perforce, dissent.

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[13] Judge Emilio M.. Garza, our seventeenth active jduge, recused himself from the outset.

Cheryl J. Hopwood, et al. v. State of Texas, et al., Nos. 94-50569 and 94-50664 Stewart, Circuit Judge, dissenting from failure to grant rehearing en banc.

I wholeheartedly concur in the dissent to the denial of en banc rehearing. I write separately to underscore the lack of historical perspective and sensitivity in both the panel majority's opinion and the vote not to consider this case en banc.

That it is the University of Texas School of Law's admissions policy at issue is a fact whose significance has not been lost on any of us. In 1946, this very school denied admission to Heman Marion Sweatt because he was black, prompting him to sue the University. Sweatt's real difficulties began fifty years before when the United States Supreme Court scripted one of this nation's most evil conceits in Plessy v Ferguson, 163 U.S. 537 (1896), declaring "separate but equal" treatment of black Americans constitutional. Plessy was no more than a license for continued racial discrimination. However, in 1950 the Supreme Court held that excluding Sweatt on account of his race violated the Equal Protection Clause of the Fourteenth Amendment. Sweatt v Painter, 339 U.S. 629 (1950).[14]

History, in its characteristic irony, takes this court to that hallowed ground of civil rights jurisprudence to assess the University's effort to encourage minority enrollment and counter its legacy of segregation. It is an unfortunate, further irony that the panel majority opinion should so overreach in its decision. In Sweatt's case, the Supreme Court explicitly adhered to the "principle of deciding constitutional questions only in the context of the particular case before the Court," drawing its decision "as narrowly as possible." Id. at 631 (citing Rescue Army v. Municipal Court, 1947, 331 U.S. 549 (1947)). If there ever were a time to end

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[14] When a court ordered the State to provide a law school for blacks, Texas created a "makeshift law school that had no permanent staff, no library staff, no facilities, and was not accredited." Hopwood v. State of Texas, 861 F. Supp. 551, 553 (1994). This "law school" consisted of 3 rooms in a basement and had two professors. Paul Butler, Affirmative Action Admissions, Dallas Morning News, April 7, 1996, at IJ.

legalized segregation, that was the time. The Court was in a position to paint with a broad brush and eliminate the very regime which denied civil rights to Sweatt and other blacks. Chief Justice Vinson's opinion for the Court, however, resisted calls to wax on "[b]roader issues . . . urged for our consideration." Id.

The panel majority in our case displayed no such discipline, instead taking the unauthorized liberty of deciding the appropriateness of diversity as an admissions criterion, not just the merits of the instant admissions policy. Constitutional interpretation is a sensitive project. Limiting ourselves to the facts before the court keeps the process measured--it is a traditional check which respects the need to calibrate rights and interests carefully. Given the sensitivity of constitutional interpretation, the panel majority's decision disrespects the importance of the facts. Refusing to correct this travesty en banc is a grave error.

As to the request to intervene, what class of persons is more qualified to adduce the evidence of the present effects of past discrimination than current and prospective black law students? Reading Sweatt as a benchmark decision marking the end of de jure segregation is akin to shelving Trotsky's The History of the Russian Revolution upon reading only the preface. Just as those initial pages fail to give a true rendition of the entire work, so too does Sweatt give only a superficial understanding of the racism it hardly addressed. A year after the Supreme Court ordered that Sweatt be admitted, he left the law school "without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." Hopwood v State of Texas, 861 F.Supp. 551, 555 (1994). Furthermore, "the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students." Id. It was not until 1983 that Texas even agreed, after years of threats of federal action, to an acceptable plan to desegregate its higher education system. In 1987 and again in 1994, the Department of Education instructed Texas to maintain its plan. To this day, Texas's higher education system still has not been

declared in compliance with Title VI and the Fourteenth Amendment. Id. at 556-57.

"The life of the law," Justice Oliver Wendell Holmes observed, "is not logic, but experience." To divorce the time in which it was legally possible for Sweatt to attend the Law School from the reality he experienced there is to ignore the very insidiousness of racial discrimination. It was the vestiges of that discrimination which, far from being destroyed, thrived and drove Sweatt out of the Law School. We act no less callously now in pretermitting the consideration of that legacy of discrimination by denying rehearing.

For all these reasons and those expressed in the collective dissent, I vehemently disagree with our court's decision not to rehear this case en banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

United States Constitution, Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . .

United States Constitution, Amendment XIV, Section 1

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State . . . to the full an equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

42 U.S.C. § 1983

Every person who, under color of any statute, regulation, custom, or usage, of any State . . . subjects, or causes to subjected, any citizen of the United States . . . to a deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d—7(a)(1)

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal Financial assistance.

Supreme Court, U.S.
F I L E D
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CLERK

(4)

No. 95-1773

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners seek review by this Court of six "questions" raising the following issues:

1. Whether, as both courts below found and as petitioners have repeatedly conceded, the admissions process used in 1992 by the University of Texas at Austin Law School impermissibly discriminated on the basis of race and thus violated the Constitution.

2. Whether petitioners may use race to grant preferences in law school admissions to members of two select racial groups in order to remedy generalized societal discrimination or discrimination by state actors other than the law school.

3. Whether petitioners may rely on this Court's decision in *United States v. Fordice* as a mandate to adopt new, racially discriminatory admissions procedures unconnected to any policies from the *de jure* era.

4. Whether the provision in Title VI of the Civil Rights Act of 1964, as amended, which provides that those States that choose to receive federal funds have waived their Eleventh Amendment immunity, is unconstitutional under this Court's decision in *Seminole Tribe of Florida v. Florida.*

5. Whether the approach to burden-shifting used by this Court in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* and a variety of other cases, including racial discrimination cases, applies to this case.

6. Whether a court decision that clarifies the law, and thus has some prospective impact on the conduct of those who wish to conform their conduct to the law, violates the "case" or "controversy" requirement of Article III.

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---

BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

Respondents Cheryl J. Hopwood and Douglas W. Carvell (hereafter "respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Court of Appeals for the Fifth Circuit held that petitioners' law school admissions program, which used racial preferences and race-based decisionmaking in order to achieve pre-determined racial and ethnic ratios in the student body, violated the Equal Protection Clause of the Fourteenth Amendment. Petitioners, who have announced to the public that they will cease to discriminate and will no longer permit race to play a determinative role in admissions, have simultaneously sought review by this Court to challenge the correctness of the lower court's decision prohibiting the racial practices petitioners assert they have abandoned.

Petitioners acknowledge that the "central question before this Court" is the constitutional limit on the use of race in law school admissions. Pet. 1. Petitioners, however, wish to be on all sides of that "central question," and this case is therefore not an appropriate one for certiorari review.

All agree that petitioners' 1992 admissions process was predicated upon unconstitutional racial discrimination: the district court so held, and petitioners did not appeal from that holding; all three circuit judges reached the same conclusion; and the Attorney General for petitioner State of Texas has recently announced that that program was unconstitutional. (The Attorney General's press release and accompanying statement have been lodged with the Court.)

Respondents agree with petitioners' public announcement that "[a]dmissions decisions should not be based upon race or ethnicity," that race "should play no determinative role" in the admissions process, and that "past discrimination [will never be overcome] by practicing discrimination today." Those statements are fully consistent with the court of appeals' decision, which requires that "the law school may not use race as a factor in law school admissions." Pet. App. A3. Petitioners' public avowal that "the Law School has altered its admissions policy to conform with these principles" and their recent, albeit belated, recognition that these principles are mandated by the Constitution, suggest that petitioners intend to *comply* with the court of appeals' decision, regardless of how the Court acts on their certiorari petition.

In their petition to this Court, however, petitioners take a position squarely in conflict with their public pronouncements. In the petition, petitioners have not disavowed reliance on race, or even reliance on "diversity" as a justification for using race in admissions decisions; nor have they abandoned the use of arbitrary percentages as targets for racial and ethnic ratios in the law school. Pet. 29.

Petitioners are thus in the untenable position of asking this Court for an advisory opinion concerning an admissions program that is not the subject of this litigation, is nowhere set forth in the record, was not considered by either of the courts below, and which -- if petitioners' latest public pronouncements are truthful -- they do not intend to implement.

This case undeniably involves important issues, but it is equally undeniable that, given the state of the record and petitioners' public statements, it is not the appropriate vehicle for the Court to address those issues. In light of petitioners' refusal to articulate forthrightly and consistently the policies they choose to defend before this Court, the Court should deny the petition and allow the courts below to implement the court of appeals' decision.

STATEMENT

The petition misdescribes the record, misstates many important findings of fact, and attempts to mislead the Court as to the nature of the case. Consequently, respondents set forth below the relevant facts.

A. The Law School's Admissions Process

The law school, as petitioners recognize, is "the State's flagship institution," Pet. 1, "one of the nation's leading law schools" and "a bargain for the quality of education the law school's students receive." Pet. App. A4, B23. It is undisputed that in 1992 the law school "discriminate[d] in favor" of African American and Mexican American applicants by giving them "substantial racial preferences in its admissions program," and discriminated against all others "based upon the color of their skin." *Id.* A3, A12.

It is also undisputed that *de jure* discrimination *against* African Americans by the law school ended after *Sweatt v. Painter*, 339 U.S. 629 (1950), and that there was never *de jure* discrimination in education against Mexican Americans.

Pet. App. A43, A47-A48 n.50. Petitioners' practice of *favoring* African Americans and Mexican Americans in admissions has existed since at least the late 1960s. *Id.* A43. By 1992, the preferential admissions program had evolved into a system designed specifically to achieve a class consisting of at least 10% Mexican Americans and 5% African Americans, percentages "virtually indistinguishable from quotas." *Id.* A71 (Wiener, J., concurring). Those two groups, and only those two groups, were the beneficiaries of petitioners' race preferences, and members of those groups were given preferences even when they were from other states, or had attended private or out-of-state schools. *E.g.*, *id.* A6 n.4, A39, A71-A72; B18 n.22.[1]

In order to meet the predetermined racial proportions, admissions decisions were based largely on an applicant's "Texas Index" ("TI") number, a composite of undergraduate GPA and LSAT scores. The TI numbers were "paramount" in the admissions process and petitioners "relied heavily" on the TI in making admissions decisions. *Id.* A4.

The law school used TI scores to sort applicants into "presumptive admit," "presumptive deny," and "discretionary

[1] Petitioners repeatedly state that the 5% and 10% "targets" are "purely aspirational," *e.g.*, Pet. 5, 29, but they have been "especially adept" in hitting their "targets." Pet. App. A32 n.36. For the five most recent entering classes before the district court (1989 through 1993), the percentage of Mexican Americans ranged from 10.0 to 11.6 and the percentage of African Americans ranged from 5.9 to 8.0. *Id.* B49 n.67. Moreover, the circuit court found that the "targets" are not "purely aspirational": Judge Wiener described the targets as "virtually indistinguishable from quotas," and the majority opinion below emphasized that petitioners continually manipulated the presumptive admission and presumptive denial scores in order to achieve their predetermined racial targets. *E.g.*, *id.* A7 & n.6, A9 & n.10.

admit" categories. Most applicants in the "presumptive admit" category were admitted "with little review," while those in the "presumptive deny" category were also given little consideration before being rejected. *Id.* A5.

"Blacks and Mexican Americans were treated differently from other candidates . . . ." *Id.* A6. "First, compared to whites and non-preferred minorities, the TI ranges that were used to place [preferred minorities] into the three admissions categories were lowered to allow the law school to consider and admit more of them." *Id.* A6-A7. In 1992, the "presumptive admit" score for whites and non-preferred minorities was 199; their presumptive deny score was 192. For blacks and Mexican Americans, the presumptive admit score was 189; the presumptive deny score was 179. *Id.* A7; *see also* note 2, *infra.*

Thus, as the district court found, "the presumptive denial score for nonminorities was higher than the presumptive admission score for [the two preferred] minorities." *Id.* B21. Given the way petitioners chose to structure their admissions system, "[t]hese disparate standards greatly affected a candidate's chance of admission. . . . [B]ecause the presumptive *denial* score for whites [and the other non-preferred groups] was a TI of 192 or lower, and the presumptive *admit* TI for [the two preferred] minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be *admitted*, even though his score was considerably below the level at which a white candidate almost certainly would be *rejected*. Out of the pool of resident applicants who fell within this range (189-192 inclusive), 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission." *Id.* A8-A9 (emphases by the court) (footnote omitted).

Petitioners' admissions system contained a number of other race-based selection procedures. "In addition to maintaining separate presumptive [admit and deny] levels for minorities

and whites, the law school ran a segregated evaluation process" and "race was always an overt part of the review of any applicant's file." *Id.* A9-A10. Applications were color-coded according to race so that each applicant's race would be obvious to administrators, even at a glance. Admissions decisions were based solely on material included in the applicant's file, which made the contents of the race-coded file determinative. *Id.* B24. There was no individual comparison between minority and nonminority applicants. *Id.* B52. The law school kept racially segregated waiting lists. *Id.* A10.

For applicants with TI scores within the discretionary zone, candidates from the two preferred minority groups were reviewed differently from all others, receiving the benefit of a more searching and individualized consideration by a special, separate "minority subcommittee," the decisions of which were "virtually final." *Id.* A10.[2]

Both respondents Cheryl J. Hopwood ("Hopwood") and Douglas W. Carvell ("Carvell") were, at the time of suit, Texas residents who had applied for admission to the law school's 1992 entering class. Respondents' applications were reviewed through petitioners' race-based admissions process. Hopwood had a TI score of 199 (a "presumptive admit") and Carvell had a TI score of 197 (a "presumptive admit" score if he had been black or Mexican American, and at the high end of the "discretionary admit" for everyone not a member of the preferred groups). Neither respondent is an African American nor a Mexican American, and both were denied admission. *Id.* A10-A11. No African American or Mexican

[2] Indeed, the district court found that in 1992 the files of *all* African American or Mexican American applicants below the "presumptive admit" line -- even those in the "presumptive *denial*" category -- were reviewed in the same way by the special minority subcommittee. Pet. App. B15.

American state resident with a TI score of 193 or above was rejected by the law school during 1992. Trial Tr., Vol. 6 at 17-18.

B. The Proceedings Below

1. The District Court's Decision

Respondents sued under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.* (1994)), and 42 U.S.C. §§ 1981 and 1983 (1994), alleging that petitioners administered a racially discriminatory admissions program in violation of their statutory rights and their rights under the Fourteenth Amendment to the Constitution.

Following a bench trial, the district court found that the petitioners had violated respondents' rights to equal protection of the laws. The district court concluded, however, that the constitutional violation was limited to petitioners' use of separate admissions committees. As the circuit court recognized, this "victory was pyrrhic at best," Pet. App. A11, because the district court refused to enjoin the law school from using race in admissions. The district court also denied prospective injunctive relief because the law school, on the eve of trial, announced the adoption of a single committee admissions system -- even though the single committee would use the same admission standards to produce the same racial proportions in the student body.[3]

[3] Like their announcement at the time of filing their petition, petitioners' eve-of-trial announcement offered little detailed information about the "new procedure." Indeed, petitioners have a practice of "announcing" policies that sound benign, while pursuing undisclosed policies that are manifestly invidious. The "new procedure" described at trial still contained the 10% and 5% "targets" for admissions of Mexican Americans and African Americans, and applicants' TI scores would still be compared only with others in their racial group. Trial Tr., Vol. 6 at 64-69. Petitioners gave no termination date for their "new procedure."

The district court refused to order that petitioners be admitted to the law school on the ground that they "had not met their burden of showing that they would have been admitted but for the unlawful system." *Id.* A13. The court denied compensatory and punitive damages except "a one-dollar nominal award to each plaintiff" and the "right" to re-apply to the law school without paying a new application fee. *Id.* A11.

2. The Court Of Appeals' Decision

The court of appeals reversed and remanded for further proceedings. Following this Court's precedents, the court held that "discrimination based upon race is highly suspect" and that racial classifications are therefore subject to strict judicial scrutiny. Pet. App. A14-A15. The court then proceeded to analyze petitioners' program within the strict scrutiny framework. First, the court concluded that petitioners' purported "diversity" goal "is not a compelling interest under the Fourteenth Amendment," *id.* A23, and thus does not provide a constitutional basis for engaging in racial discrimination. "Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals." *Id.* A26. In reaching that conclusion, the court of appeals was guided primarily by this Court's decisions in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), and *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). The court concluded that "we see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional. Were we to decide otherwise, we would

contravene precedent that we are not authorized to challenge." Pet. App. A27.[4]

The court then analyzed petitioners' "remedial" justification in light of this Court's guidance that remedying the present effects of past discrimination may be a compelling interest for purposes of the Fourteenth Amendment. *Id.* A35-A47. Based upon the absence of evidence that the law school had ever discriminated against Mexican Americans, and upon evidence that its discrimination against blacks had ended decades earlier, the court below found that petitioners' only justifications for their discriminatory admissions program were arguments based upon alleged *societal* discrimination, and alleged discrimination by state actors other than the law school itself. The court found that petitioners' purported remedial regime was "boundless" and gave rise to "an inference . . . that the program was the result of racial social engineering rather than a desire to implement a remedy." *Id.* A39. Such justifications for race discrimination have been rejected by this Court, and consequently the circuit court

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[4] The Department of Justice, as an amicus supporting petitioners, implies that this Court's racial classification jurisprudence should be compartmentalized, and that precedents such as *Croson* and *Adarand* do not apply to higher education. Brief For The United States As Amicus Curiae Supporting Petitioners ("DOJ Br.") 13-14. That implication is directly contrary to this Court's emphasis in *Adarand* on the unitary nature of its racial classification jurisprudence, and the Court's emphasis on *Croson* as an integral part of that jurisprudence. *See, e.g., Adarand*, 115 S. Ct. at 2106-11 (tracing the consistency of the Court's race classification decisions from *Hirabayashi v. United States*, 320 U.S. 81 (1943), "through *Croson*"). Indeed, the attempt by the Justice Department to limit *Croson* is inconsistent with the Court's reliance in *Croson* itself on an example drawn from higher education. *Croson*, 488 U.S. at 499.

concluded that petitioners had failed to show a compelling interest in remedying the present effects of past discrimination sufficient to maintain the use of race in their admission system. *Id.* A47. In light of this conclusion, the court did not need to consider whether petitioners' program was "narrowly tailored" to serve a compelling remedial interest, but noted that petitioners' 5% and 10% "targets" "are more reflective of a goal of diversity . . . than of a goal of remedying past discrimination." *Id.* A47 & n.50; *see also* A70-A72 (Wiener, J., concurring) (concluding that petitioners' program was not "narrowly tailored").

With respect to petitioners' "new [eve-of-trial] procedure," the court of appeals found that there was nothing in the record to indicate that the "new procedure" would "cure the additional constitutional defects" identified by the court. "Most significantly, there is no indication that in employing the new plan, the law school will cease to consider race *per se* in making its admissions decisions. To the contrary, as the district court recognized, the law school continues to assert that overt racial preferences are necessary to the attainment of its goals." *Id.* A54.

The court also held that the district court had improperly imposed on respondents the burden of showing how petitioners' admissions system would have operated if it had been free of a racial taint, and that the district court had also erred in its analysis of the availability of compensatory damages. *Id.* A51-A53. The court declined to award punitive damages, and declined to issue an injunction. *Id.* A55. The court remanded for further proceedings. *Id.* A62.

Petitioners did not seek rehearing of the court of appeals' decision.

C. Petitioners' "New Course" For Admissions

On the day the petition was filed, the Attorney General for petitioner State of Texas announced a "new course" for admissions at the University of Texas School of Law, one in

which admissions decisions will no longer "be based upon race or ethnicity," and in which race will play "no determinative role." There will instead apparently be a system in which there will be only one standard for all applicants, regardless of race. This "new course" does not appear to involve the 5% and 10% racial targets previously pursued by petitioners. Somewhat confusingly, however, the Attorney General announced that race and ethnicity *will* be considered in some unspecified way as part of "determining individual merit."[5]

The petition appears to articulate yet a third "new policy," Pet. 4, one in which "[e]ach candidate is given fully individualized treatment on his or her own merits," *id.* 5, but race remains an essential factor, the percentage targets remain in place and "diversity" remains an essential justification for the scheme. *Id.* 29. Significantly, petitioners do not cite any record support for this description of their "new policy," and concede that "the record contains far too little information about the current admissions policy." *Id.*

REASONS FOR DENYING THE WRIT

Petitioners urge no fewer than six separate "questions presented," each of which they maintain requires the Court to exercise its certiorari jurisdiction. This case does not, however, satisfy the Court's criteria for certiorari review.

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[5] Equating race with merit would appear to be the essence of racism. Indeed, not even Justice Powell's *Bakke* opinion goes anywhere near that far. Moreover, considering race as one of a "multitude of personal factors" in an individual case is either irrelevant or determinative. If race is to play "no determinative role," then there is no point to considering race at all.

A. The Decision Below Does Not "Overrule" *Bakke*

Petitioners first assert that "the court of appeals took it upon itself to overrule, anticipatorily, the holding of a five-Justice majority" in *Bakke*. Pet. 1. Petitioners mischaracterize both *Bakke* and the court of appeals' decision.

Petitioners urge that the court of appeals "ignored" the "holding" of *Bakke* set forth in Part V-C of the *Bakke* decision, a single paragraph of the decision and the only paragraph (other than the factual statement) that commanded the votes of five Justices. Pet. 12. Part V-C provides in its entirety:

> In enjoining petitioner from *ever* considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from *any* consideration of the race of any applicant must be reversed.

Bakke, 438 U.S. at 320 (emphases added). Petitioners do not attempt to explain how the decision below is inconsistent with Part V-C and, indeed, there is no inconsistency.

Part V-C simply provides that the Constitution does not preclude consideration of race in *all* circumstances, and thus under some circumstances a State may consider race in admissions as part of a "properly devised admissions program." The court below agreed, recognizing that a State may take race into consideration as part of a narrowly tailored program to remedy the present effects of historical discrimination. *E.g.*, Pet. App. A16, A33. The court therefore did not forbid the consideration of race in all

circumstances, and thus is not "in flat violation" of *Bakke*. Pet. 12. The court's holding that *petitioners* could not use race in admissions simply reflects the court's conclusion, amply supported by the record, that under this Court's precedents, petitioners' race-driven admissions program was not narrowly tailored to remedy the present effects of past discrimination. But the decision plainly does not conflict with what petitioners characterize as the "holding" of *Bakke*. The similar statement by the Justice Department that the court below "recognized" that its decision was inconsistent with *Bakke's* "holding," made without citation to the court's opinion, is also incorrect. DOJ Br. 9.

For the same reason, the court of appeals did not "overrule" *Bakke*, because the *Bakke* precedent, even in petitioners' view, is contained *only* in Part V-C. The court below separately considered whether the bulk of Justice Powell's lone opinion in *Bakke* that was *not* part of the Court's decision -- his discussion of "diversity" -- was binding precedent, and concluded that it was not. As the court below accurately observed, "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case." Pet. App. A23. There is nothing either wrong or surprising in the court's straightforward analysis and application of *Bakke*.[6] Petitioners' attempt to suggest otherwise is contradicted by the care the court gave to its analysis and by the *Bakke* decision itself.[7]

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[6] The circuit court's painstaking analysis of Justice Powell's *Bakke* opinion is also fully consistent with this Court's recent instructions as to how such "fifth vote" concurring opinions are to be interpreted. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127-28 (1996); *Rutledge v. United States*, 116 S. Ct. 1241, 1246, 1249 (1996).

[7] Petitioners accuse the court of appeals of relying in its discussion of *Bakke* on "concurring and dissenting opinions

[Footnote continued on next page]

Petitioners' final *Bakke* argument is that "[w]hatever the status of *Bakke*, the issue should be decided by this Court, so that the same rule applies across the country." Pet. 15. By the "status of *Bakke*" petitioners clearly do not mean to suggest that there is any confusion about Part V-C; rather, they are concerned with the fate of Justice Powell's extensive *dicta* about "diversity."[8]

Petitioners do not pretend that there is any conflict among the circuits on this issue. To the contrary, the only other recent circuit decision involving the use of racial preferences in higher education was relied upon by the court of appeals below, and the two decisions are fully consistent. *Cf. Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (holding a race-exclusive scholarship to be unconstitutional), *cert. denied*, 115 S. Ct. 2001 (1995); *see also* Pet. App. A41-A43.

[Footnote continued from previous page]

by the members of this Court," but immediately acknowledge, in a footnote, that the court based its *Bakke* analysis on "five citations to Supreme Court majority opinions," as well as other authorities. Pet. 13 & n.7. Petitioners' point in counting citations is obscure, but in any event they contradict themselves.

[8] The Justice Department goes far beyond Justice Powell's *Bakke* opinion, stating that the law school has a compelling interest in "a *racially* diverse student body." DOJ Br. 16 (emphasis in original). For Justice Powell, "diversity" was not merely a code word for "proportional race representation" or "racial balance." *See Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *id.* at 315 (an admissions program focused solely on race "would hinder rather than further attainment of genuine diversity"). *See also Croson*, 488 U.S. at 507 ("racial balancing" an impermissible goal).

The circuit court system and this Court's certiorari practice presume that at various points in time different "rules" will obtain in the different circuits as the law develops; indeed, allowing such different "rules" to emerge is a primary element in this Court's historical exercise of its certiorari power. Respondents believe that this Court's decisions make clear the "status of *Bakke*" -- and also make clear the separate issue of the status of Justice Powell's solitary *dicta* in *Bakke* -- so that the same rule *already* applies across the country.[9] There is no basis for presuming, so shortly after the court of appeals' decision, that any "circuit split" will develop, particularly in light of the guidance that the Court gave on the issue of racial classifications in its very recent decision in *Adarand*. Should such a division of authority ever arise, this Court can resolve any such differences at that time.

In any event, the legitimacy *vel non* of petitioners' strained *Bakke* argument is not worthy of certiorari in the context of *this* case. As Judge Wiener's concurrence makes plain, even if petitioners' expansive interpretation of Justice Powell's *Bakke* opinion has somehow become the law of the land, petitioners' program must still be held to violate the Constitution, because it is not "narrowly tailored" to accomplish even an interest in "diversity." Pet. App. A70-A72. Thus the issue at the heart of the petition -- the legal

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[9] Other cases have rejected Justice Powell's *Bakke dicta* in light of this Court's teachings in *Croson*. *E.g.*, *Podberesky v. Kirwan*, 956 F.2d 52, 55 (4th Cir. 1992) ("Because of the danger of stigmatic harm, classifications based on race, understandably, must be reserved for remedial settings.") (citing *Croson*); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.) ("The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination . . . only a purpose of remedying discrimination against minorities will do so."), *cert. denied*, 500 U.S. 954 (1991).

significance of Justice Powell's sentiments about "diversity" in *Bakke* -- is not squarely presented by this case. The Court should not grant certiorari review merely to affirm on the unremarkable ground that, assuming without deciding that "diversity" is a compelling interest, petitioners' admissions program does not satisfy "narrow tailoring."

B. The Court Of Appeals Correctly Applied This Court's Precedents To Petitioners' Purported "Remedial" Justification

Petitioners' second "question presented" appears to be a plea that petitioners be authorized to consider societal discrimination in order to justify their use of race in admissions. *Compare* Pet. i with 16-20. Significantly, even Justice Powell's *Bakke* opinion, which petitioners otherwise embrace, rejected such a proffered justification for racial discrimination. *Bakke*, 438 U.S. at 307-08. The Court has repeatedly reached the same conclusion. *Croson*, 488 U.S. at 498-99; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 268 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for finding race-conscious state action and for imposing a racially classified remedy."); *see also Adarand*, 115 S. Ct. at 2109-10 (endorsing *Croson's* approach to the "analysis for remedial race-based governmental action").[10]

Petitioners imply that their admissions program was adopted at the long-ago command of the federal Office of Civil Rights ("OCR") in the Department of Education. Pet. 8-9, 18. It was not, as both lower courts found. *E.g.*, Pet. App. A46 (race-based admission program was "self-initiated"

[10]Petitioners try to manufacture a "circuit split" on this issue by citing two cases decided before *Adarand* and *Croson*. Pet. 18. In those latter two cases, this Court provided extensive guidance on this issue, and petitioners do not identify any *current* circuit split.

and there is "no indication" that OCR "imposed a direct obligation upon the law school"); *id.* B36 (OCR "has not, however, required the State to adopt any specific procedures"). In any event, OCR could not require petitioners to adopt a program in violation of the Constitution. *Id.* A45.[11]

Petitioners also seek to justify the law school's admissions program by reference to discrimination by the State in primary and secondary schools. Pet. 16-17. This Court, however, has required that race preferences be designed to remedy discrimination "by the governmental unit involved." *Wygant*, 476 U.S. at 274 (plurality opinion); *see also Croson*, 488 U.S. at 499 (rejecting professional school preference based on "discrimination in primary and secondary schooling").[12] Other than the discrimination they practiced in

[11]Petitioners offer a misleading quotation from *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994), to support the proposition that Texas' "long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute," *id.* at 866. Pet. 8. The court in *LULAC* specifically limited that statement by the phrase -- omitted by petitioners -- that such history was not in dispute "among the parties" to that case. 999 F.2d at 866. In any case, petitioners never explain how discrimination against *Hispanics* justifies a preference for *Mexican Americans*, to the exclusion of, for example, Honduran Americans or Cuban Americans, and other Hispanic Americans.

[12]The Justice Department suggests that the law school's reliance on discrimination in public schooling is factually distinguishable from the Court's clear statement in *Croson* prohibiting such reliance. DOJ Br. 19 n.17. The Court in *Croson*, however, invoked discrimination in primary education as a classic example of societal discrimination that could not be taken into account by a professional school to support a racial preference. 488 U.S. at 499; *see also Wygant*, 476 U.S. at 268 (plurality opinion).

favor of preferred minorities and against non-preferred groups, petitioners have never identified any discrimination by the law school in admissions in the last forty years, and cannot invoke the conduct of *other* state actors, because the law school operates completely autonomously in admissions.[13]

C. The Decision Below Is Consistent With This Court's Decision In *United States v. Fordice*

Somewhat inconsistently with their arguments about "diversity," petitioners claim that "[t]his is not just an affirmative action case; it is a desegregation case." Pet. 20. Citing *United States v. Fordice*, 505 U.S. 717 (1992),

[13] *E.g.*, Pet. App. A39 (law school "operates as a functionally separate unit within the system" and "maintains its own separate admissions program"). Petitioner Dean Yudof submitted a sworn statement to the district court that "[t]he actual mechanics of [the law school's] admissions policies, including its goals of minority recruitment and diversity in the incoming class, are the province of the admissions committee and myself exclusively. There are no directives, instructions, orders or any other form of commands from the State, the Board of Regents, or the University as a whole that govern the admissions process." Defs. Trial Ex. 447, S.J. Mot. App. A58.

Similarly, petitioners' suggestion that the law school remains linked to *de jure* race discrimination is contradicted by the record and their own concessions. *See* Pet. App. A40 n.44 ("As the defendants concede and the district court found, there is no recent history of overt sanctioned discrimination at the University of Texas."); *id.* A48 n.50 ("There is no history either of *de jure* discrimination against Mexican Americans in education at any level in Texas or of *de facto* discrimination against Mexican Americans by the law school."). Indeed, as noted above, petitioners have discriminated *in favor* of selected minorities in admissions for more than a quarter century.

petitioners attempt to invoke their "broad affirmative duty . . . to dismantle" officially segregated systems of higher education to justify their use of a racially discriminatory admissions process at the law school. Pet. 20.

Petitioners' argument is not even a plausible construction of *Fordice*. *Fordice* described the obligations under the Fourteenth Amendment of a State that had formerly operated a dual system of higher education. The Court held that those policies traceable to the *de jure* era of segregation had to be "reformed to the extent practicable and consistent with sound educational practices." *Fordice*, 505 U.S. at 729. Thus, to fall within *Fordice*, petitioners must start by identifying a law school admissions policy traceable to the *de jure* era. Not only have they repeatedly failed to do so (and fail to do so again in the petition), but it is abundantly clear that the admissions policies at the law school are *not* traceable to the *de jure* era. Petitioner Johanson, the long-time chair of the law school's admissions committee, testified that in the 1960s the law school had "virtually open enrollment." Trial Tr., Vol. 3 at 12; *see also id.* at 13 ("if you were breathing, then you were admitted to the UT Law School"). Further, as noted above, as early as the 1960s petitioners had adopted admissions practices that granted preferences to minorities. There is thus a clean and undeniable break with the admissions policies of the *de jure* era. And, of course, there was never any *de jure* discrimination against Mexican Americans. Pet. App. A48 n.50.

Petitioners assert that "[t]he evidence was undisputed that if Texas is compelled to abandon any consideration of race at its state law schools, it will return to a starkly dual system of legal education." Pet. 21. In fact, there was *no* such evidence in the record. Rather, petitioners presented evidence that under an imaginary regime, in which they were *compelled to rely strictly upon test scores alone*, very few minorities would qualify. But respondents have never urged that petitioners use only test scores, and petitioners are

certainly not legally obligated to do so. Petitioners will presumably *never* adopt a purely numerical scheme, given their recognition of the limitations of GPA and LSAT scores, Pet. 11, and they remain free to admit students of all races including those who have relatively low test scores. Petitioners also remain free to attract students of all races by a variety of incentives and programs, so long as they comply with the Constitution and applicable statutes. Their "undisputed evidence" is nothing more than rhetorical hyperbole, wholly irrelevant to this lawsuit. For precisely the same reasons, petitioners' assertion that "the effective resegregation" of the law school was "[n]ot contested below," Pet. 1, is entirely incorrect.

Petitioners urge that they have a "constitutional duty . . . to eliminate, or to counteract and minimize to the extent possible, strict reliance on test scores that effectively segregate white and minority students." Pet. 21. *Fordice* imposes no such duty, because, as shown above, "strict reliance on test scores" is not a policy traceable to the *de jure* era. But even assuming petitioners do have such a duty, they do not explain why they cannot simply "eliminate . . . strict reliance on test scores," without taking race into account. Indeed, petitioners may eliminate all reliance on test scores if they so choose. Certainly nothing in the decision below prevents them from doing so.

The invocation by petitioners and the Justice Department of the specter of "resegregation" is both false and offensive, because it is based upon the implicit premise that minorities cannot compete in a color-blind system that does not contain "special" preferences designed to benefit them alone. The "resegregation" argument is also wholly at odds with petitioners' repeated insistence that race is only a modest factor in admissions, only "one of many factors" to be considered. *Id.* 29. If the use of race is truly so minimal, then *prohibiting* petitioners' use of race should not have a

substantial impact on admissions. Petitioners cannot have it both ways.

Fordice cannot be transformed into a warrant to adopt new policies that have no relationship to desegregation and that themselves discriminate on the basis of race. The decision below is entirely consistent with *Fordice*, and review is therefore not warranted.

D. *Seminole Tribe* Does Not Insulate Petitioners From Damages Under Title VI

Petitioners assert that under *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Eleventh Amendment bars claims against the States under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1994). But as the Justice Department recognizes, this Court's decision in *Seminole Tribe* neither transforms Title VI jurisprudence, nor invalidates the decision below. *See* DOJ Br. 10 n.8 (Texas has no sovereign immunity from suits under Title VI).

Seminole Tribe clarified that Congress can abrogate States' Eleventh Amendment immunity to suit provided that it manifests a clear intent to do so, and acts "pursuant to a valid exercise of power." 116 S. Ct. at 1123-24. Title VI, as amended, provides explicitly that a "State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . Title VI of the Civil Rights Act of 1964 . . . ." 42 U.S.C. § 2000d-7(a)(1) (1994). Petitioners contend that such abrogation of Eleventh Amendment immunity was not "pursuant to a valid exercise of power."[14]

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[14]At the time of petitioners' Eleventh Amendment motion in the district court, the law school and the University of Texas were not named as defendants, and petitioners have not previously in this litigation raised any Eleventh Amendment defense on their behalf. Thus, whether the law school is entitled to Eleventh Amendment immunity as an

[Footnote continued on next page]

There can be no doubt of Congress' power under the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity from suit. *Seminole Tribe*, 116 S. Ct. at 1125, 1131 n.15. *Accord Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("Congress may . . . for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials"). Nor is there any doubt that this Court, prior to *Seminole Tribe*, held that Congress *had* abrogated States' immunity when it amended Title VI in 1986. *Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60, 72 (1992) (in the 1986 amendments, "Congress abrogated the States' Eleventh Amendment immunity under . . . Title VI"). *See also id.* at 78 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., concurring in the judgment) (noting that the 1986 amendment "withdr[ew] the States' Eleventh Amendment immunity"). Nothing in Chief Justice Rehnquist's opinion for the Court in *Seminole Tribe*, in which Justices Scalia and Thomas joined, indicates that the Court in that case meant to overrule *Franklin*.

Moreover, the statute at issue in *Seminole Tribe* could have been enacted *only* under Congress' Article I powers. Title VI's abrogation of Eleventh Amendment immunity, however, could be based on Congress' power under either or both Article I and Section 5 of the Fourteenth Amendment. This

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[Footnote continued from previous page]

arm of the State was not addressed by the courts below. Given the unusual nature of the Eleventh Amendment defense, and its intricate dependence on questions of state law, this Court has indicated that as a prudential matter it may choose not to address an Eleventh Amendment argument on such a scant record. *E.g., Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982).

Court has previously rejected arguments that Congress must specifically invoke its Section 5 powers. *E.g., EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (in exercising its authority under Section 5, Congress need not state that it is relying upon that power). In reviewing legislation, the courts need only "be able to discern some legislative purpose or factual predicate that supports the exercise of that [Section 5] power." *Id.* Indeed, this Court previously relied on Section 5 to uphold another statute regulating practices of recipients of federal funds, where authority under Article I may have been limited. *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980) (plurality opinion) (upholding statute under Section 5 even though Congress made no statements regarding use of that power because "Congress *could have* achieved its objectives by use of its power under § 5 of the Fourteenth Amendment") (emphasis added). Similarly, in this case, Congress clearly could have achieved its objectives under Title VI by use of its power under Section 5, and nothing in *Seminole Tribe* affects that analysis. This Court should avoid a strained construction of Title VI that will unnecessarily render the statute unconstitutional and injure all civil rights plaintiffs. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("every reasonable construction must be resorted to, in order to save a statute from unconstitutionality") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

Petitioners' assertion that Title VI was enacted and amended "solely" as an exercise of Congress' Spending Power depends largely on cases decided *before* the relevant 1986 amendment, and, in any event, is simply wrong. There is ample evidence, if evidence is needed, that Congress thought

it was drawing upon *both* sources of power in enacting and amending Title VI.[15]

Even if Title VI is *solely* a Spending Clause statute, petitioners' immunity claim must fail. This Court has held that states may waive their Eleventh Amendment immunity by accepting funds pursuant to a Spending Clause statute, if the statute explicitly provides that accepting such funds will bar or waive an immunity claim. Petitioners have chosen to receive federal funds in the face of the statute's explicit provision that the States that do so may not invoke Eleventh Amendment immunity. Petitioners' argument that the amended Title VI is not clear on this point, Pet. 24 n.17, is incredible in light of the statutory text. *See also* 132 Cong. Rec. 28,624 (1986) (1986 amendments to Title VI clarify that States' "receipt of Federal funds constitutes a waiver" of Eleventh Amendment immunity).

E. The Court Of Appeals Followed This Court's Precedents In Allocating The Burden Of Proof

Petitioners' argument with respect to the court of appeals' allocation of the burden of proof does not involve a question of law. Rather, it is predicated upon a disagreement about a finding of fact, which disagreement does not constitute a question worthy of certiorari review. Moreover, the court of

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[15]*See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 686 n.7 (1979) (quoting legislative history that 1976 amendments to Title VI are based on "Congress' obligation to enforce the 14th amendment"); *Bakke*, 438 U.S. at 330-33 (opinion of Brennan, White, Marshall and Blackmun, JJ.) (citing legislative history to demonstrate that Title VI was predicated on the Fifth and Fourteenth Amendments); *id.* at 416 (opinion of Stevens, J.) (same); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986) (1986 amendments adopted pursuant to Section 5 of the Fourteenth Amendment).

appeals' decision is fully consistent with this Court's precedents.

Petitioners state, correctly, that in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977), this Court held that "once a plaintiff proves that an impermissible consideration was a 'substantial factor' in causing the plaintiff concrete injury (such as the loss of a job), the burden then shifts to the defendant to show that it would have reached the same decision in the absence of the constitutional violation." Pet. 26 (citing *Mt. Healthy*, 429 U.S. at 287). Petitioners argue that the law school's reliance on race was not a "substantial factor" in respondent's rejection. *Id.* That is an extraordinary assertion because the record demonstrates that respondents would have been admitted to the law school *if they had belonged to one of the preferred racial groups.* When the "impermissible consideration" is determinative, it is plainly a "substantial factor." But in any event, petitioners present only a factual dispute, not a dispute about the correct legal standard.[16]

Petitioners also mischaracterize the court of appeals' opinion by arguing that the court "has in effect *presumed* that

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[16]Petitioners urge that 151 nonminority residents with TI scores lower than respondents' scores were offered admission. Pet. 26. The same point, of course, could be made about the *Bakke* case, in which the average nonminority applicant granted admission had scores significantly lower than Allan Bakke's scores. *Bakke*, 438 U.S. at 277 n.7. Petitioners emphasize this statistic to suggest that respondents' admission would not have been assured under a race-neutral system. Respondents have never argued to the contrary. Respondents contend only that under this Court's precedents, because petitioners engaged in impermissible racial discrimination in their admissions program, petitioners have the burden to *prove* that respondents would *not* have been admitted under a race-neutral system.

respondents are entitled to admission simply because the Law School considered race in its admissions decisions." Pet. 27. If petitioners mean to suggest that the court of appeals created a *conclusive* presumption, they plainly are mistaken: on remand, petitioners will have the opportunity to demonstrate "that a plaintiff would not have gained admittance to the law school under a race blind system," and if they do so, "that plaintiff would not be entitled to an injunction admitting him to the school." Pet. App. A51. There is thus no conclusive presumption involved at all; and any objection to a rebuttable presumption is simply wrong. Under *Mt. Healthy* (and the decision below), if petitioners -- who crafted the admissions process -- fail to carry their burden, respondents are entitled to an order of admission or other equivalent remedy. *See* Pet. App. A51-A52. Such burden shifting is not in tension with *Carey v. Piphus*, 435 U.S. 247 (1978), the case on which petitioners rely. In *Carey*, this Court -- consistent with its decisions in *Mt. Healthy* and *Villiage of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) -- required school officials, who had suspended students in violation of their due process rights, to prove on remand that the students "would have been suspended even if a proper hearing had been held," and if the officials could do so, *then* the students would not be entitled to damages. *Carey*, 435 U.S. at 260. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (adopting the same burden shifting mechanism for Title VII cases); *id.* at 269 (O'Connor, J., concurring) (noting lower courts' use of same burden shifting mechanism in Equal Protection Clause cases).

Petitioners further urge that as a result of the operation of the *Mt. Healthy* rule, respondents are placed "in a better position than they would have occupied" had the law school chosen not to discriminate in the first place. Pet. 27. That argument ignores, for example, the fact that respondent Cheryl Hopwood's legal career has been delayed by at least

five years. Petitioners also complain that they are now exposed to suit by all those against whom they have discriminated. *Id.* All discriminators could, and generally do, make the same complaints. Petitioners -- proven and self-confessed discriminators -- surely should not be permitted to invoke the *duration, scale and effectiveness* of their own misconduct in order to limit respondents' relief. The record shows that petitioners willfully chose to discriminate, and petitioners' exposure to suit is entirely of their own making. Ensuring that appropriate remedies are available in these circumstances is intended to deter would-be discriminators across the board. The burden cannot be on the victims of discrimination to show "what would have happened" under a constitutional program when the admissions program is entirely under petitioners' control. Moreover, the particular amount of petitioners' exposure to damages from victims of their racial discrimination does not constitute a question worthy of certiorari review.

F. Federal Courts May Decide Cases Without Violating Article III

Petitioners' last ground for seeking certiorari is predicated on another obvious mischaracterization of the court of appeals' decision, and indeed of the judicial process.

Petitioners assert that the court of appeals awarded "prospective relief" in the form of "thinly-veiled judicial directives," and that "such intrusive equitable relief" is both unjustified on the record here and contrary to Article III's "case" or "controversy" requirement. Pet. 28-29.

The first, and dispositive, answer to this singularly confused argument is that the court of appeals did not award any "prospective relief." Although respondents *asked* the court to enter prospective injunctive relief, the court specifically *declined* to do so. *E.g.*, Pet. App. A55 ("we leave intact [the district] court's refusal to enter an injunction"). No injunction

will issue without further proceedings before the district court. *Id.*

Second, *Adarand* is instructive on this issue. In that case, Adarand Constructors, Inc. sought to enjoin *future* use of racial classifications in a contracting program. The Court held that the company had standing to seek prospective injunctive relief because the record contained evidence that it was likely to bid again and thus be subject to the contracting program. *Adarand*, 115 S. Ct. at 2104-05. In order to avoid the teaching of *Adarand*, petitioners assert -- baldly and incorrectly -- that "the record is barren of support for the speculation that plaintiffs will reapply" to the law school. Pet. 28. In fact, the record is very explicit on that point: the district court found (in an opinion cited by petitioners but not included in their appendix) that "there exists a reasonable likelihood Plaintiffs will, if not granted admission in this lawsuit, want to reapply to the Law School . . . ." October 28, 1993 Memorandum Opinion and Order at 10, cited at Pet. 3. Similarly, respondent Hopwood testified that she was ready, willing and able to attend the law school if the Court issued an order that permitted her to do so without having to subject herself to a racially discriminatory admissions process. *E.g.*, Trial Tr., Vol. 8 at 10.

Third, petitioners argue that the record simply does not contain enough information about their current admissions policy. Pet. 28-29. That is indeed correct, but it is a compelling reason why this Court should not grant certiorari in order to pass on an amorphous, unverified "plan" that petitioners themselves continue to describe in contradictory terms. What the record does contain is ample support for the court of appeals' conclusions that petitioners had failed to justify under strict scrutiny their use of race in admissions, and that petitioners' unconstitutional discrimination must stop.

Petitioners' argument is actually a challenge to judicial review. The court of appeals clearly stated the law, and clearly expects petitioners to abide by its decision. Petitioners of course are not now free to revert to the use of race to discriminate in admissions, unless they can meet the requirements of strict scrutiny. But similar consequences flow *whenever* a court elucidates the commands of the Constitution, as actors are required to change their conduct to conform to the law as pronounced by the judicial system. It simply is not the case that such prospective *effects* of judicial decisions amount to *injunctions* (particularly when the deciding court specifically says it is not issuing an injunction). Similarly, that a judicial decision might cause individuals to change their conduct in order to conform to the law does not mean the decision was issued in violation of Article III.

Even if petitioners' characterization of the decision below as an "injunction" were correct, the decision would clearly be proper. Petitioners repeatedly insisted in the courts below that they intended to continue to discriminate in admissions, and there is a specific finding "that it is likely that the law school will continue to take race into account in admissions unless it receives further judicial instruction," Pet. App. A54-A55. This Court has long recognized that changes in conduct induced by pending litigation do not insulate defendants from prospective injunctions, and petitioners have repeatedly conceded that all changes to their admissions process were driven by this litigation. *See, e.g., id.* A13 n.15 (law school changed its procedure as a result of this suit). The courts' "power to grant injunctive relief survives the discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974), the Court stated that "a unilateral change in the *admissions procedures* of the Law School" does not deprive the Court of authority to issue appropriate relief if (as here) the plaintiff may reapply. (Emphasis in original).

As the court below stated in another discrimination case, "reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated." *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-55 (5th Cir. 1977) (Wisdom, J.) (ordering prospective injunctive relief against discriminatory employment policies), *cert. denied*, 434 U.S. 1034 (1978). It makes no sense -- for the parties or for the judicial system -- to require the same issues to be relitigated every time a discriminator makes some modest or cosmetic change to its race-based policies. Indeed, given the inevitable delays and costs associated with bringing suit, such a rule could well mean that state actors could escape meaningful judicial review of their racially discriminatory activities. Civil rights plaintiffs in respondents' position should not be required to bring suit repeatedly to remedy massive resistance by confessed discriminators.

CONCLUSION

The petition for a writ of certiorari should be denied.

May 30, 1996.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*, *Petitioners*

vs.

CHERYL J. HOPWOOD, *et al.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO THE BRIEF FOR CHERYL J. HOPWOOD AND DOUGLAS W. CARVELL IN OPPOSITION

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REPLY BRIEF OF PETITIONERS

Nearly all of what respondents Hopwood and Carvell say in their Brief in Opposition ("Opp.") either goes solely to the merits of petitioners' attack on the decision below rather than to the certworthiness of the case, or rests on a tendentious reading of the record and the precedents, or both. Petitioners accordingly respond here only to the proposition, relevant to certworthiness if true, that the petition seeks an "advisory opinion" approving an "admissions program . . . nowhere set forth in the record . . . which . . . they do not intend to implement." Opp. 3. Respondents' claim rests on their assertion that petitioners' "public announcement" that "race 'should play no *determinative* role' in . . . admissions," Opp. 2 (emphasis added), supposedly "suggest[s] that petitioners intend to *comply* with the court of appeals' decision, regardless of how the Court acts on their certiorari petition." *Id.* (emphasis in original).

Respondents are wrong. They err fatally in assuming that the Fifth Circuit's mandate that petitioners "may not use race *as a factor* in law school admissions," Pet. App. A3 (emphasis added) -- a mandate flatly inconsistent with this Court's holding in Part V-C of *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) -- precludes no more than what petitioners abandoned before trial -- namely, the decisive use of race to classify applicants into separate groups, and to process them under separate race-based criteria. The use of race in that manner, which petitioners have no intention of defending in this Court, is entirely distinct from the use of race as one of many factors relevant to each applicant's background and experience, which characterizes the admissions program petitioners put in place in 1994 and operated until the decision below brought it to a halt prior to the issuance of a stay by the court of appeals on April 19, 1996.

To be sure, further details about the new program, and information about its operation and effects, were not before the courts below and are not part of the record here. But that is irrelevant to the questions presented in the petition, apart from reinforcing the inappropriateness under Article III of the sweeping directives promulgated by the court below. For at issue in this case is not the ultimate validity of the precise admissions program currently employed by the University of Texas School of Law -- a program that all concede this record is inadequate to assess definitively, *see* Pet. 28-29; Opp. 28 -- but the validity, under Article III and the Fourteenth Amendment, of the court of appeals' exercise of the federal judicial power to forbid *any consideration at all* of race as a factor in individualized admissions decisions by that law school, whether to obtain "a diverse student body," Pet. App. A55, or to "remedy[] the present effects of past discrimination by actors other than the law school," *id.*, or for any of the other reasons offered by the law school in this case.[1]

Such consideration of race on an individualized basis is a practice that the petitioners most emphatically *do* engage in and will continue to engage in so long as petitioners' educational aims or remedial duties require, unless and until the stay of the

[1] Respondents' contention that "Judge Wiener's concurrence makes plain" that "the issue at the heart of the petition" is "not squarely presented by this case," Opp. 15-16, is flatly incorrect. Judge Wiener would have held only that the *pre-1994* admissions process -- that is, the two-track process that petitioners have abandoned and that is not being defended in this Court -- was inadequately tailored to the State's interests and would have been invalid even if the court of appeals had not repudiated *Bakke*. Pet. App. A71-72. On the point that *is* presented by the petition for certiorari -- whether, given *Bakke*, the court of appeals erred in prohibiting all consideration of race -- Judge Wiener, together with six other judges dissenting from the failure to grant rehearing en banc, expressed the strong and quite unmistakable view that the Fifth Circuit's decision broke new and deeply disturbing ground. *See* Pet. App. A63-64, A65-66, A72, A75, E1-11.

decision below is lifted and that decision reinstated.[2]

Whether *any* such consideration of "race *per se*," Pet. App. A27, in petitioners' law school admissions process is indeed "proscribed" as unconstitutional, *id.*, as the court below held it to be, is a question unavoidably presented by this case. That question clearly poses issues very different from those presented by the pre-1994 two-track admissions policy that was struck down by the district court in a decision from which petitioners took no appeal and that petitioners do not defend in this Court.

Because those issues are manifestly of great national importance and could not be presented any more squarely than they are here, and because the other questions presented are similarly of undoubted national moment notwithstanding the efforts of respondents to defend the correctness of what the court below did, the petition for writ of certiorari should be granted.

[2] Respondents stitch together selective snippets from a press release by the Texas Attorney General in an attempt to suggest something different. Suffice it to say that the press release does not support respondents' creative interpretation. In any event, the Petition for Writ of Certiorari itself, filed by the Texas Attorney General, expresses the position of the State of Texas.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF TEXAS, ET AL., PETITIONERS

v.

CHERYL J. HOPWOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the University of Texas School of Law may not constitutionally consider race or national origin as a factor in its admissions process.

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INTEREST OF THE UNITED STATES

The United States Department of Education has primary responsibility for the administrative enforcement of federal civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance. The Department's regulations and policy guidance interpreting Title VI provide that educational institutions may take race into consideration for the purposes of remedying past discrimination or enrolling a diverse student body. See 34 C.F.R. 100.3(b)(6)(i); 59 Fed. Reg. 8756, 8759-8762 (1994).

The Department of Education's Office for Civil Rights has engaged in efforts to eliminate the vestiges of the dual systems of higher education that previously were operated by a number of States, including Texas. The

United States Department of Justice is participating in Title VI litigation to desegregate the systems of higher education in Mississippi, Louisiana, Alabama, and Tennessee. The United States has a strong interest in desegregating institutions of higher education and in ensuring that the States are not hampered in their efforts to remedy the effects of unconstitutional discrimination on those systems.

STATEMENT

1. In 1946, acting pursuant to the requirements of the Texas Constitution,[1] the University of Texas School of Law (the Law School) denied admission to Heman Sweatt, a black man, solely on account of his race. This Court reversed that decision, unanimously rejecting the assertion that an unaccredited, makeshift law school that Texas had established for blacks could provide Sweatt with an equal educational opportunity. *Sweatt* v. *Painter*, 339 U.S. 629 (1950). Sweatt thereafter became the only non-white student in the Law School. He left the school in 1951, without graduating, because of severe racial harassment from his classmates and professors. Pet. App. B6.

After *Sweatt* was decided, the University of Texas continued officially to discriminate against black and Mexican-American students with regard to housing and facilities. Enforced segregation pervaded the State's entire educational system well into the 1960s. Texas responded to *Brown* v. *Board of Education*, 347 U.S. 483 (1954), with a policy of official resistance to the integration of its public schools, Pet. App. B4, and as recently as the 1980s some Texas school districts continued to

[1] Tex. Const. art. VII, § 7 (repealed 1969) (requiring the maintenance of "separate schools * * * for the white and colored children").

practice overt race-based segregation, see, *e.g.*, *United States* v. *Crucial*, 722 F.2d 1182, 1184-1185 (5th Cir. 1983). In many Texas school districts, the effects of prior *de jure* segregation continue to manifest themselves in segregated schools. Pet. App. B4.

2. In the late 1970s, the Department of Health, Education and Welfare's Office for Civil Rights (OCR) began an investigation of the Texas public higher educational system, pursuant to the court order in *Adams* v. *Richardson*, 356 F. Supp. 92 (D.D.C.), aff'd as modified, 480 F.2d 1159 (D.C. Cir. 1973). OCR found that Texas had failed to eliminate the vestiges of its dual higher education system. It began negotiations with the State to bring it into compliance with Title VI by removing those vestiges. Pet. App. B7-B8. In 1983, Texas submitted a desegregation plan acceptable to OCR. That plan included both a general commitment "to seek to achieve proportions of black and Hispanic graduates from undergraduate institutions in the State who enter graduate study or professional schools in the State at least equal to the proportion of white Texas graduates from undergraduate institutions in the State who enter such programs," and a specific commitment by the University of Texas to increase the number of black and Hispanic college graduates entering its graduate and professional schools. *Id.* at B9 n.6. OCR (now within the Department of Education) has committed to evaluating whether, in light of *United States* v. *Fordice*, 505 U.S. 717 (1992), the State has eliminated all vestiges of its former *de jure* segregated higher education system. See 59 Fed. Reg. 4271, 4272 (1994); Pet. App. B9-B10.

The Law School first initiated affirmative efforts to include minorities in its student body in the late 1960s, almost 20 years after *Sweatt* was decided. Pet. App. B11. The Law School discontinued this program in 1971; it

consequently admitted no black students that year. *Id.* at B12. Since then, its affirmative action efforts have taken various forms. In 1992, the year respondents were denied admission, a minority admissions subcommittee reviewed the files of all black and Mexican-American applicants and used lower presumptive admissions standards (based on standardized test scores and college grade-point averages) for them. The subcommittee presented recommendations to the full admissions committee, which accorded them dispositive weight. *Id.* at B17-B25.

3. Respondents, three white men and one white woman, were denied admission to the Law School in 1992. They filed suit in the United States District Court for the Western District of Texas, alleging that, "by favoring less qualified black and Mexican American applicants," defendants discriminated against them on the basis of race, in violation of the Fourteenth Amendment; Title VI; 42 U.S.C. 1981 and 42 U.S.C. 1983. Pet. App. B2. After an eight-day bench trial, the district court concluded that two of the purposes set forth in the Law School's "Statement of Policy on Affirmative Action" (see *id.* at B39) were sufficiently compelling, under strict scrutiny, to support race-conscious admissions practices: (1) achieving the educational benefits of a diverse student body; and (2) remedying the present effects of past discrimination in the Law School and in Texas's educational system as a whole. *Ibid.*[2] Although the court

[2] The court concluded, based on the evidence at trial, that a diverse student population provides substantial educational benefits "for all members of a law school class." Pet. App. B25. The court also found that the continuing effects of the Law School's own past discrimination presented "a strong evidentiary basis for concluding that remedial action is necessary." *Id.* at B43. Observing, moreover, that "[t]he State's institutions of higher education are inextricably linked to the primary and secondary schools in the system," *ibid.*, the court found an additional compelling remedial interest in redressing the effects of the discrimination that pervaded the Texas educational system as a whole, *id.* at B46.

observed that "[a]lternatives, such as minority scholarships and increased minority recruitment" are "effective tools in conjunction with the affirmative action program," it concluded that those measures "would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effect[s] of past *de jure* segregation." *Id.* at B47-B48.[3]

The district court determined, however, that the Law School's use of a separate minority subcommittee effectively precluded individual comparisons between minority and nonminority applicants and thus did not satisfy the narrow tailoring requirement of strict scrutiny. For that reason, the court held that the Law School's 1992 admissions practices violated respondents' right to equal protection. Pet. App. B38-B59, B66-B67.

The district court denied respondents' prayer for relief in most other respects. It awarded only nominal damages, and declined to order respondents' admission to the Law School, having concluded from the evidence that, "in all likelihood, [respondents] would not have been offered admission even under a constitutionally permissible process." Pet. App. B65. The court also de-

[3] Under its general admissions criteria, and absent affirmative action, the Law School's 1992 entering class would have included, at most, a very small number of black and Mexican-American students. Pet. App. B41 & n.60, B47. The district court also found that the effect of eliminating affirmative action at the Law School would be to direct even more minority students to Texas Southern University Law School—the school Texas created, in response to Heman Sweatt's lawsuit, in order to avoid integration of the University of Texas. *Id.* at B47 & n.66.

clined to issue an injunction against the Law School's future consideration of race in the admissions process. The court noted that Law School had, during the course of the litigation, adopted new admissions practices that eliminated the minority subcommittee and the use of differing presumptive admissions standards. The new practices "appear[ed] to remedy the defects the Court ha[d] found in the 1992 procedure"; and, in any event, the application of the new practices was not before the court. *Id.* at B67. The court directed that respondents be permitted to reapply (without fee) for admission to the 1995 entering class under the new admissions practices. *Id.* at B67-B68.

4. Petitioners did not appeal the district court's ruling that the Law School's 1992 admissions process violated equal protection; respondents appealed the district court's denial to them of damages and injunctive relief. The court of appeals reversed.[4] Expressly rejecting the continuing force of this Court's holding in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978), the panel majority held that, no matter how narrowly tailored the process, "the law school may not use race as a factor in law school admissions." Pet. App. A3.

The court of appeals concluded that this Court's opinions since *Bakke* leave no room for the view that a law school may ever take race into account for the purpose of obtaining the educational benefits of a diverse student population. Although none of the cases cited by the panel majority involved school admissions standards, the panel

[4] The court of appeals affirmed the district court's order denying the request of two black student groups to intervene for the purpose of introducing evidence of discriminatory effects of the Law School's current admissions procedures. Those denied intervention have filed a petition (No. 95-1845) seeking review of that decision.

majority read them to establish that, irrespective of context, remedying past discrimination is the only governmental interest that may warrant consideration of race. Pet. App. A24-A26.

The court then rejected, as insufficiently compelling, the Law School's and State's interest in remedying the effects of *de jure* segregation in the Texas system of public education. It held that, just as "a state does not have a compelling state interest in remedying the effects of past *societal* discrimination," a particular state actor has no governmental interest in remedying official discrimination that has occurred at other levels of state government. Pet. App. A35, A36-A40. Past discrimination in Texas's primary and secondary schools, in its system of higher education, or at the University of Texas itself could not, in the court's view, "justify the present consideration of race in law school admissions." *Id.* at A45.

With regard to the Law School's interest in remedying its own history of official discrimination, the majority held that neither the Law School's reputation as a "white" institution, nor its hostile racial climate, justify consideration of race in its admissions process. Those conditions result, in its view, from (respectively) mere "knowledge of historical fact" and "present societal discrimination." Pet. App. A42.

With respect to certain forms of relief sought by respondents, the court of appeals concluded that the district court erred in placing the burden of proof on respondents to demonstrate that they would have been admitted to the Law School under a constitutionally permissible admissions policy. Pet. App. A48-A51. It instructed that each respondent must, on remand, be awarded admission to the Law School and given the opportunity to establish monetary damages, unless the Law

School proves that that respondent would not have been admitted in 1992 under a completely race-blind procedure. *Id.* at A51-A52. The court of appeals further directed that, should they choose to reapply, respondents "are entitled to apply under a system of admissions that will not discriminate against anyone on the basis of race." *Id.* at A54.

Finally, the court of appeals affirmed the district court's denial of prospective injunctive relief, "confident that the conscientious administration at the school, as well as its attorneys, w[ould] heed the directives contained in [its] opinion." Pet. App. A55. It cautioned, however, "that if the law school continues to operate a * * * racial classification system in the future, its actors could be subject to actual and punitive damages." *Ibid.*

Judge Weiner concurred only in the judgment. Pet. App. A63-A75. He saw no need in this case to determine whether diversity is a compelling governmental interest in the graduate school context, *id.* at A63-A70, and (noting that respondents had challenged only the Law School's 1992 admissions policy), faulted the majority for issuing what amounted to a "de facto" prospective injunction, *id.* at A73.

Considering the matter *sua sponte*, the court of appeals denied rehearing en banc. Pet. App. C1-C3. Seven of the Circuit's sixteen active judges dissented from the denial.[5] *Id.* at E1-E11. Chief Judge Politz's dissenting opinion argued that the "radical implications" and "monumental import" of the case demanded en banc review, *id.* at E2, and criticized the panel for "stringing together pieces and shards of recent Supreme Court opinions * * * as a justification for overruling *Bakke*," *id.* at E3. Judge Stewart, writing separately, noted that

[5] Judge Garza did not participate in the decision. Pet. App. C3.

official segregation had occurred at the Law School in the relatively recent past, and stressed the need to carefully consider that legacy when judging the lawfulness of the school's present remedial efforts. *Id.* at E9-E11.

ARGUMENT

The court of appeals has flatly held that the University of Texas School of Law may not consider the race of applicants as a relevant factor in making its admissions decisions. If left unreviewed, this decision will effectively eliminate all affirmative action admissions programs in higher education within the Fifth Circuit.[6] The court of appeals recognized that its decision is inconsistent with the holding of this Court in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978). By disregarding two decades of established law under *Bakke*, the decision has already created substantial confusion and upheaval among colleges and universities nationwide.[7] It also calls into question the lawfulness of existing Department of Education policies and regulations, and interferes with the federal government's efforts to obtain voluntary compliance by the States with

[6] Because the constraints imposed by Title VI on affirmative action programs are the same as those imposed by the Constitution, see *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992), the decision affects private colleges and universities that receive federal assistance as well as state institutions. We are informed by the National Center for Education Statistics, within the Department of Education, that there are more than 240 colleges and universities offering four-year degrees in Texas, Louisiana, and Mississippi.

[7] The Attorney General of one State outside the Fifth Circuit (Georgia) has already recommended that affirmative action policies in the State's colleges and universities be revised or eliminated in light of the decision below. See William H. Honan, *New Attack on Race-Based Admissions*, N.Y. Times, Apr. 10, 1996, at B8.

their desegregation obligations. The decision below thus raises issues of national importance that call for this Court's review.

1. The court of appeals' conclusion that the Law School has no compelling interest that warrants its consideration of race or national origin in its admissions process cannot be dismissed as mere "statements in [an] opinion[]." *California* v. *Rooney*, 483 U.S. 307, 311 (1987). That conclusion was essential to the terms of the court's remand order. In remanding the case to the district court to consider remedy, the court of appeals ruled that, for relief to be denied to a respondent, the Law School must prove that that respondent would not have been admitted under what the court of appeals held, in the liability portion of its opinion, to be the only constitutionally permissible admissions policy, i.e., a completely "race-blind system." Pet. App. A51. The court of appeals' conclusion that the Law School may not constitutionally consider race in admissions was therefore an essential part of the court's holding, and not merely "unfortunate dicta" (*id.* at E8).[8]

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[8] Petitioners suggest (Pet. 22-24) that the Eleventh Amendment bars federal courts jurisdiction in suits against the States under Title VI. Even if that were so, the district court would have jurisdiction to afford prospective injunctive relief (in the form of admission to the Law School) against the individual petitioners in their official capacities under 42 U.S.C. 1983. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). Such relief is not barred by sovereign immunity. See *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114, 1131 nn. 14, 16 (1996).

In any event, Texas has no sovereign immunity from suits brought under Title VI. In 1986, Congress, "act[ing] pursuant to a valid exercise of power," *Seminole Tribe*, 116 S. Ct. at 1123, expressly abrogated the States' Eleventh Amendment immunity under Title VI. See Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845, codified at 42 U.S.C. 2000d-7; see also *Franklin* v. *Gwinnett Cty. Public Schools*, 503 U.S. 60, 72-73 (1992). Section 2000d-7 was enacted in response to this Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242-243 (1985). It provides that a "state shall not be immune under the Eleventh Amendment * * * from suit in Federal Court for a violation of * * * Title VI." The legislative history of the provision shows that Congress acted pursuant to its authority under Section 5 of the Fourteenth Amendment. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986); 131 Cong. Rec. 22,346 (1985); 132 Cong. Rec. 28,624 (1986). The only court of appeals to consider the issue upheld Section 2000d-7 against an Eleventh Amendment challenge on that basis. See *United States* v. *Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990). In addition, and contrary to petitioners' suggestion (Pet. 24 n.17), Congress's explicit decision that the States be subject to suit in federal court under Section 2000d-7 "makes it clear to the [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). See *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981).

Moreover, although the court of appeals declined to authorize a formal injunction at this time barring the Law School from any consideration of race or national origin in its admissions program, the court's opinion effectively amounts to such an injunction. The court directed that, "[i]n accordance with [its] opinion," respondents must be permitted to reapply "under a system of admissions that will not discriminate against anyone on the basis of race," Pet. App. A54, and expressly warned that the Law School's failure to "heed" the "directives contained within [its] opinion" would provide cause for punitive damages. *Id.* at A55.[9] "[W]hen confronted with

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[9] The panel subsequently noted the "necessity" that petitioners "implement as soon as possible th[e] court's *mandate* to end racial discrimination in admissions at the law school." Pet. App. D5 (emphasis added). The court of appeals would also likely conclude that the panel's "directives" established the law of the circuit with sufficient clarity to foreclose a claim of qualified immunity for university or state officials sued for damages for considering race as a factor in admissions deci-

such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it." *Gunn* v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 (1970). Having "all of the substantive earmarks of an injunction," the court of appeals' opinion is correctly treated as such. Pet. App. A73.[10]

2. In *Bakke*, this Court affirmed the judgment of the California Supreme Court holding unconstitutional a state medical school's use of a rigid race-based admissions quota, but reversed that portion of the state-court judgment that completely prohibited the school from considering race in its admissions process. Five Justices agreed in *Bakke* that the medical school could constitutionally consider race under a "properly devised admissions program." 438 U.S. at 320 (opinion of Powell, J.); *id.* at 328 (Brennan, J., concurring in the judgment in part, and dissenting in part).[11] *Bakke*'s landmark holding has guided the admissions policies of public and private institutions of higher education in the United States for almost two decades. The panel below nevertheless declared that *Bakke*'s holding is no longer good law.

Justice Powell's opinion in *Bakke* applied strict scrutiny. *Bakke*, 438 U.S. at 291. It rested its approval of the use of race in the context of a properly devised admissions program on the educational benefits of a diverse student body. *Id.* at 311-315. This Court has cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990), overruled in part, *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097 (1995); see also *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

The court of appeals declined to follow *Bakke* because, in its view, a majority of this Court has since rejected the diversity rationale as a permissible predicate for affirmative action. See Pet. App. A17-A33. In so concluding, the court of appeals relied on cases involving affirmative action in public contracting, such as *Adarand*, *supra*, and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), rather than decisions regarding higher education

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sions. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Elder* v. *Holloway*, 114 S. Ct. 1019, 1021 (1994).

[10] Petitioners correctly assert (Pet. 28-29) that respondents lacked standing to assert the rights of nonparties, and that the court of appeals therefore had no jurisdiction to issue injunctive relief barring consideration of race by the Law School with respect to other applicants. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 479 (1990) ("[T]he Article III question is not whether the requested relief would [affect] the world at large, but whether [respondents] ha[ve] a stake in the relief."). The court of appeals' directives were also related, however, to the court's instruction that respondents personally be accorded the right to reapply to the Law School under a race-blind system. Pet. App. A54. To the extent that any respondent demonstrated "a real and immediate" possibility that he or she would in fact reapply, that would provide standing and establish the court of appeals' jurisdiction to afford individual prospective injunctive relief. See, *e.g.*, *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2104 (1995).

[11] The remaining Justices would have affirmed the state court's holding that Bakke's exclusion from the medical school violated Title VI. They expressly declined to address the constitutionality of the admissions program. See 438 U.S. at 408-409 (Stevens, J., concurring in the judgment in part and dissenting in part).

admissions programs.[12] The Court's suggestion in *Croson* that racial classifications should be "reserved for remedial settings," 488 U.S. at 493, was made in the context of public contracting, where redress of past discrimination may be the only compelling governmental purpose for the use of racial preferences. See *id.* at 512-513 (Stevens, J., concurring). Affirmative action may also serve vital remedial interests in the university admissions setting. See pp. 16-20 , *infra*. It may, in addition, contribute to—indeed be necessary to—achieving the goal of educational diversity,[13] a goal not relevant in the awarding of construction contracts.

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[12] *Adarand* and *Croson* established that strict scrutiny applies to race-conscious affirmative action programs. The Court expressly noted in *Adarand* that Justice Powell also applied "the most exacting judicial examination" when he concluded in *Bakke* that diversity constitutes a sufficiently weighty state interest in the context of admissions in higher education. See *Adarand*, 115 S. Ct. at 2108 (quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J.)).

[13] The Department of Education has relied upon Justice Powell's opinion in *Bakke* as a basis for concluding that diversity-based affirmative action in higher education does not violate Title VI, so long as it meets the constitutional standards described by Justice Powell. See 59 Fed. Reg. 8756, 8760-8762 (1994). Relying on Justice Powell's opinion in *Bakke*, the district court concluded in this case that the Law School's 1992 practice was constitutionally infirm, not because it considered race as a factor in admissions, but because it utilized a "separate process" that "fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race." Pet. App. B59. We agree that the 1992 "separate process" policy was constitutionally flawed in this manner. Petitioners did not appeal the district court's ruling with respect to the 1992 policy, "having abandoned that policy in 1994 in favor of one that treated race as simply a factor in the individualized consideration and comparison of applicants to the Law School." Pet. 3-4. The constitutionality of the means by which the Law School has taken race into account is therefore not at issue. Rather, the question here is whether

Justice Powell's observation in *Bakke* (a case involving medical school admissions) that "an otherwise qualified * * * student with a particular background * * * may bring to a professional school * * * experiences, outlooks and ideas that enrich the training of its student body and better equip its graduates," 438 U.S. at 314,[14] has even greater force with regard to schools that educate and train lawyers. Law students cannot effectively be trained "in isolation from the individuals and institutions with which the law interacts." *Sweatt*, 339 U.S. at 634. This Court correctly concluded in *Sweatt* that a black student could not receive an effective legal education in Texas while being kept separate from "members of racial groups which number[ed] 85% of the population of the State." *Ibid.* The predominantly white University of Texas School of Law may similarly conclude today that, absent racial diversity in its classrooms, its students will not effectively be prepared to be lawyers in Texas's (or the Nation's) racially diverse society.

The court of appeals' suggestion that the Law School may constitutionally consider non-racial factors, including economic and social background, that might be

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the Law School may consider race at all in making its admissions decisions.

[14] Justice Powell recognized in *Bakke*, 438 U.S. at 312 n.48 (quoting William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly (Sept. 26, 1977) at 9), that

> a great deal of learning occurs informally[,] * * * through interactions among students of both sexes; of different races, religions and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.

closely correlated with race, Pet. App. A27, A29 n.31, ignores the Law School's compelling educational interest in maintaining a *racially* diverse student body. In the law school admissions context, race is not merely a "proxy for other, more germane bases of classification," *Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting), such as economic disadvantage. As the district court found from the evidence at trial, Pet. App. B41, at this time in the history of Texas and the United States, the inclusion in the law school educational process of those who have experienced, and will continue to experience, racial minority status, is essential to achieving meaningful educational diversity. That view does not rest on impermissible racial stereotypes; it does not equate race with particular viewpoints; and it does not presume that all individuals of a particular race act or think alike. An admissions program that values racial diversity recognizes that a black (or Mexican-American) student reared in this country is likely to have had different life experiences, *precisely because of his or her race*, than an otherwise similarly situated white student. What each individual takes from those life experiences is unique; indeed, students may benefit from diversity by learning first-hand that "particular and distinct viewpoint[s] [do *not*] inhere in certain racial groups." *Metro Broadcasting*, 497 U.S. at 618 (O'Connor, J., dissenting). Cf. *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting)[15]

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[15] Assuming that a law school may constitutionally consider race as a factor for purposes of educational diversity, the means by which it does so must be narrowly tailored to advance that interest, in order to ensure that the school's race-sensitivity does not reflect or promote racial stereotypes, see *Adarand*, 488 U.S. at 493, or impose disproportionate harm on nonminority applicants, see *Wygant*, 476 U.S. at 287 (O'Connor, J., concurring). See also 59 Fed. Reg. at 8760-8762. A law school may not, for example, employ rigid numerical goals amounting to fixed quotas or set-asides, which deny each applicant's right to be treated as an individual in the admissions process in a pool of applicants of all races. See *Bakke*, 438 U.S. at 318-320 (opinion of Powell, J.).

3. The legitimacy of the Law School's concern for diversity in this case is underscored by the history of educational discrimination in Texas. The vestiges of that history have kept many black and Mexican-American students separated from white students for most of their educational lives. In prohibiting the use of race in Law School admissions, the court of appeals acknowledged that official discrimination against minorities has existed in the State's public schools, see Pet. App. A39, and it did not dispute the district court's finding (*id.* at B45) that "[t]he effects of the State's past *de jure* segregation in the education system are reflected in the low enrollment of minorities in professional schools, including the law school." The court held, however, that the Law School's constitutionally valid remedial interests extend no further than redressing the effects of its *own* prior racial discrimination. *Id.* at A38 n.43. That conclusion finds no support in this Court's jurisprudence; it ignores the close nexus between a state university and the State's public schools; and it represents an unwarranted intrusion into state governmental structures.

a. The practical effect of the court of appeals' holding will be to return the most prestigious institutions within state university systems to their former "white" status, and thereby to prolong, rather than eliminate, the vestiges of unconstitutional exclusion and segregation. That result ignores Texas's strong interest in eliminating the vestiges of state-sponsored discrimination—an interest

that is not satisfied by the mere adoption of race-neutral policies. See *Fordice*, 505 U.S. at 721, 729-732.[16]

The court of appeals' position is not supported by this Court's holding in *Croson* that the City of Richmond had no compelling interest in remedying past discrimination in the national construction industry. 488 U.S. at 498. The Law School was not motivated here by generalized assertions of societal discrimination, which is an impermissible ground for affirmative action. Rather, it was attempting to address the effects on the Law School of the State's former *de jure* segregated system of public education. The court recognized that " '[a]pplicants do not arrive at the admissions office of a professional school in a vacuum.' " Pet. App. B43. Texas has imposed a requirement that most (in 1992, 85%; now, 80%) of the Law School's entering class be Texas residents. *Id.* at B23-B24 & n.33. Most students considered for admission in 1992 would therefore have attended Texas public schools during a period (the 1970s and 1980s) when many of the State's primary and secondary schools remained segregated as a result of prior *de jure* segregation. The district court here found that the effects of that segregation "are reflected in the low enrollment of minorities in * * * the law school." Pet. App. B45.

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[16] This Court has "repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination." *Metro Broadcasting*, 497 U.S. at 611 (O'Connor, J., dissenting). States and state subdivisions have both the "constitutional *duty* to take affirmative steps to eliminate the continuing effects of [their] past unconstitutional discrimination," *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring); *id.* at 280 (plurality opinion), and the constitutional "authority to eradicate the effects of [even] private discrimination" within their respective jurisdictions, *Croson*, 488 U.S. 491-492 (opinion of O'Connor, J.).

If the Law School is completely prohibited from taking those effects into account in its admissions process, the legacy of *de jure* discrimination will be left unremedied for another generation, and the Law School itself will be forced to become "a 'passive participant' in a system of racial exclusion," using "public dollars, drawn from the tax contributions of all citizens" to finance unlawful segregation. *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.); cf. *Gaston Cty.* v. *United States*, 395 U.S. 285, 296-297 (1969) (Harlan, J.) (given the history of official segregation and systemic deprivation of educational opportunities to blacks, " '[i]mpartial' administration of the literacy test today would serve only to perpetuate * * * inequalities"). The Constitution does not prohibit a State from attempting to compensate for injuries at one stage of the educational process through a remedial program at a later stage.[17]

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[17] The Court stated in *Croson* that "discrimination in primary and secondary schooling" cannot justify "a rigid racial preference in medical school admissions." 488 U.S. at 499. The Court there was apparently adverting to Justice Powell's conclusion in *Bakke* that the medical school could not rely on generalized societal discrimination (including generalized discrimination in education) to justify its use of a fixed numerical quota. In this case, the University of Texas School of Law is attempting to remedy recent, documented segregation in Texas's primary and secondary schools. The court of appeals has, moreover, prohibited *all* use of race in the admissions process—not only the use of fixed or rigid quotas.

As petitioners note (Pet. 18 & n.11), the court of appeals' view that a school of higher education may not take into account in its admissions process the effects of segregation at the primary and secondary school levels conflicts with the position taken by the Sixth Circuit in *Geier* v. *Alexander*, 801 F.2d 799 (1986). In *Geier*, the court of appeals upheld the University of Tennessee's consideration of race in admissions to a pre-professional program, on the ground that the university was not "seek[ing] to remedy some amorphous 'societal' wrong, but rather

b. There is no warrant for the court of appeals' insistence that, "for the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects." Pet. App. A39. "[A] contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite" to the adoption of an affirmative action plan. *Wygant*, 476 U.S. at 289 (O'Connor J., concurring). The unlawful segregation of blacks and Mexican-Americans in Texas's public school systems is an undisputed matter of public record. In light of its extensive experience with students drawn from the State's public schools, the Law School is particularly well placed to assess the effects of that segregation on its minority applicants.

Moreover, "how power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937) (Cardozo, J.). Here, the Texas legislature, "which has ultimate control over the school, has delegated its 'management and control' to the regents of the University of Texas system," Pet. App. B40 n.44, and the Board of Regents has in turn largely delegated the responsibility to fashion lawful and educationally beneficial admissions policies to the individual schools within the system. The Constitution does not require (or, indeed, permit) federal courts to second-guess the wisdom of those delegations.[18]

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addressing "the continuing effects of past practices that adversely affected black[s] * * * as they moved through the public school systems and the higher education system of the state." 801 F.2d at 809-810.

[18] See, *e.g.*, *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) (Harlan, J.); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be granted to review the court of appeals' holding that the University of Texas School of Law may not consider race or national origin in any manner in its admissions process.

Respectfully submitted.

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No. 95-1773

In the

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF MARYLAND, ARIZONA, HAWAII, IOWA, MASSACHUSETTS, MINNESOTA, NEW MEXICO, OKLAHOMA, WEST VIRGINIA, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is the educational objective of achieving diversity in a student body a sufficiently compelling governmental interest to permit the consideration of an applicant's race as one of many factors in a university's admissions decision?

2. May an institution of higher education voluntarily undertake race-conscious remedial measures in response to the findings of State executive branch officials that such measures are necessary to address the continuing effects of prior segregation and discrimination by the State's elementary, secondary and postsecondary education agencies?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of the State of Texas' petition for a writ of certiorari.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This Court recognized over forty years ago that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). That function lies at the heart of this case, which directly challenges the ability of the *amici* States and their institutions of higher education to secure the educational benefits of racial and ethnic diversity and to

eradicate the lingering effects of past discrimination.

The composition of the student body at an institution of higher education has a direct bearing on the kind of education provided. A diverse academic environment and community reflecting a plurality of cultural, racial, ethnic, and gender perspectives is considered fundamental to providing a first-class program of higher education. "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this nation of many peoples." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312-13 (1978) (Powell, J.) (citation omitted).

In recognition of the value that diversity serves in higher education, this Court's landmark decision in *Bakke* endorsed the creation of a diverse student body as a compelling interest for public colleges and universities. Many institutions of higher education within the *amici* States have since adopted race-conscious programs in admissions and financial aid, in reliance on *Bakke*'s validation of their right to achieve diversity in their student bodies. In furtherance of *Bakke*'s additional recognition that a racial classification may be imposed in response to judicial, legislative, or administrative findings of past discrimination, *see* 438 U.S. at 307, many colleges and universities have also implemented these programs to remedy the present effects of past discrimination and to ensure equality of educational access to all of their citizens. Therefore, for almost two decades, the *amici* States and their educational institutions have relied on the well-settled rule of law set forth in *Bakke*: that the goals of achieving diversity and correcting discrimination are sufficiently compelling to justify the individualized consideration of race.

The decision below prohibiting the University of Texas School of Law from even considering race as a factor in law school admissions would dramatically alter the law as educational institutions have long understood it. In rejecting the independent educational interest in achieving and maintaining a diverse student body, the decision below conflicts with settled applications of *Bakke* by this Court, other Federal courts of appeal and district courts, State courts of last resort, and administrative rulings of the United States Department of Education, and undermines the established practice of numerous institutions of higher education in the vitally important area of admissions. The decision below also effectively eliminates the ability of public educational institutions to remedy the effects of past discrimination by improperly restricting the types of findings and effects of past discrimination that may justify voluntary race-conscious remedial action in higher education.

Because of the strong State and national interests at stake, *amici* urge this Court to grant the writ and reverse the decision below.

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW CONFLICTS WITH WELL-ESTABLISHED PRECEDENT THAT STATES AND INSTITUTIONS OF HIGHER EDUCATION HAVE RELIED UPON IN ACHIEVING A RACIALLY DIVERSE STUDENT BODY.

In holding that *any* consideration of race or ethnicity for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment, the Court of Appeals discarded a landmark precedent of this Court that it, the lower federal courts, State courts, and the

U.S. Department of Education have uniformly followed. As a result, as the Chief Judge and seven other judges of the Court of Appeals warned, the panel opinion below "will literally change the face of public educational institutions throughout Texas, the other states of this circuit, and this nation." App. at E2. *Amici* urge this Court to review this critically important case because the decision below completely upsets the good-faith reliance that States and the higher education community have placed on the continuing legality of race-conscious programs as a means to attain a diverse student body.

As the Dean of the University of Michigan School of Law testified below, diversity is an "accepted policy and value" at Michigan and other higher education institutions, and "an accepted way of life...." R. Doc. 207 at 5. Indeed, "student diversity has, for more than a century, been valued for its capacity to contribute powerfully to the process of learning and to the creation of an effective educational environment." Rudenstine, *The Uses of Diversity*, HARVARD MAGAZINE, Mar.-Apr. 1996, at 48, 49. Embracing these settled educational interests, Justice Powell stated in *Bakke* that a "diverse student body" contributing to a "robust exchange of ideas" "*clearly* is a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12 (emphasis added).[1] In so

[1] According to Justice Powell, racial and ethnic diversity on campus is a goal protected by the academic freedom guarantees of the First Amendment. Noting the need to safeguard the "'four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and *who may be admitted to study*," Justice Powell concluded that the "atmosphere of 'speculation, experiment and creation'-- so essential to the quality

(continued...)

finding, Justice Powell specifically discussed and approved a policy previously adopted by Harvard College that considered an applicant's race as a "plus" factor in the admissions decision. 438 U.S. at 316-17. The *Bakke* decision has thus provided institutions of higher education with this Court's legal imprimatur to consider race as a constitutionally permissible means to attain a diverse student body.

The Court of Appeals nevertheless determined that it was free to disregard Justice Powell's seminal opinion, stating that no other Justice joined him in the view that diversity is a compelling interest. App. at A23. On the contrary, Justice Powell's resolution of the constitutional issues made his the pivotal opinion in *Bakke*, a fact that even the Court of Appeals acknowledged. *See* App. at A19 ("Justice Powell's opinion ... has played a *prominent* role in subsequent debates concerning the impact of *Bakke*.") (emphasis added). Indeed, the California Supreme Court had enjoined the UC Davis Medical School from considering the race of any applicant in its *Bakke* decision, and this portion of its judgment was *reversed* by a full majority of this Court. 438 U.S. at 320.[2] The Court of Appeals panel was wrong, therefore, in deciding unilaterally

[1](...continued)
of higher education -- is widely believed to be promoted by a diverse student body." 438 U.S. at 312 (*quoting Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)) (emphasis added).

[2] As John Hart Ely stated in summarizing the *Bakke* decision, after quoting the portion of Justice Powell's opinion that was joined by a majority of the Court, "*That* is the Opinion of the Court." Ely, *The Supreme Court, 1977 Term--Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10 n.33 (1978) (emphasis in original).

that it was not bound by what is "widely touted as the most significant civil rights case since *Brown v. Board of Education*, 347 U.S. 483 (1954)." Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 131 n. 4 (1978).

The Court of Appeals' decision stands in stark contrast not only to *Bakke* itself, but also to the fact that this Court, the lower federal courts, State courts, and the United States Government have repeatedly endorsed Justice Powell's articulation that race may be one of many factors that institutions of higher education may consider as a legitimate means to attain a racially diverse student body. For example, since *Bakke* this Court has at least twice recognized that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated...." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 568 (1990) (*quoting Bakke*, 438 U.S. at 311-13); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (the interest in racial diversity is "sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").[3]

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[3] Although Justice O'Connor's dissenting opinion in *Metro Broadcasting* rejected the argument that racial diversity in ownership of broadcast licenses can be a compelling interest, she has never disavowed Justice Powell's opinion in *Bakke* that diversity in higher education serves a compelling interest. *See Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2127 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is *not* inconsistent with the Court's holding today -- indeed, the question is not remotely presented in this case...."); *See also* App. at A66 (Wiener, J., specially concurring) ("Justice O'Connor expressly states that *Adarand* is not the death knell of

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Further, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), a unanimous Court cited Justice Powell's opinion in *Bakke* with approval, reaffirming the need for "autonomous decision-making by the academy" and a university's right to determine "who may be admitted to study ... as one of 'the four essential freedoms' of a university." *Id.* at 226 n.12.

The Court of Appeals' rejection of diversity as a compelling interest is also in conflict with the decisions of other courts that have likewise cited *Bakke* as permitting the consideration of race as a factor in diversity programs in the context of higher education. *See Davis v. Halpern*, 768 F. Supp. 968, 981 (E.D.N.Y. 1991) ("[I]n the absence of prior discrimination by the university the consideration of race (at least as one factor among many) by a university admissions process is constitutional only so far as it seeks to procure for the university the educational benefits which flow from having a diverse student body."); *DeRonde v. Regents of the University of California*, 172 Cal. Rptr. 677, 625 P.2d 220, 225, *cert. denied*, 454 U.S. 832 (1981) (law school admissions procedures which permitted consideration of "ethnic minority status" as a means of furthering diversity "passed federal constitutional muster under the standards prescribed by Justice Powell in *Bakke*"); *McDonald v. Hogness*, 92 Wash.2d 431, 598 P.2d 707 (1979) (*en banc*), *cert. denied*, 445 U.S. 962 (1980)

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[3](...continued)
affirmative action, ... especially not in the framework of achieving diversity in public graduate schools."); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring) ("remedy for past wrong is not the exclusive basis upon which racial classifications may be justified") (*citing* Justice Stevens' concurrence in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989)).

(upholding under *Bakke* analysis a medical school admissions procedure which considered race among other factors for the purpose of promoting diversity in the student body).[4]

In addition, the United States Department of Education, which is the agency entrusted with enforcement of Title VI of the Civil Rights Act of 1964 at educational institutions receiving federal financial assistance, has continually approved the use of race as a factor in university admissions decisions to foster student diversity.[5] In the student

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[4] *See also Podberesky v. Kirwan*, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (university scholarship program reserved exclusively for African-Americans is inconsistent with holding in *Bakke* that racial or ethnic origin may be a "'single though *important* element'" in furthering a compelling state interest in diversity) (*quoting Bakke*, 438 U.S. at 315) (emphasis added); *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993) ("[T]he Supreme Court also has recognized that 'the atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body.'") (*quoting Bakke*, 438 U.S. at 312); *Hammon v. Barry*, 826 F.2d 73, 85 (D.C. Cir. 1987) (Silberman, J., concurring) ("the Court has recognized a legitimate, compelling governmental concern in state universities' seeking racial diversity in their student bodies for educational purposes") (*citing Bakke*, 438 U.S. at 311-15); *Mallory v. Harkness*, 895 F. Supp. 1556, 1560 (S.D. Fla. 1995) (same); *United States v. Board of Educ.*, 832 F. Supp. 836, 847-48 (D.N.J. 1993) (same); *UWM Post, Inc. v. Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163, 1176 (E.D. Wis. 1991) (same).

[5] Within the last three months, for example, the Department of Education's Office for Civil Rights ("OCR") concluded an exhaustive analysis of the affirmative action program operated by the admissions office at the University of California at Berkeley, OCR Case No. 09-89-2099 (Mar. 1, (continued...)

financial aid context, the U.S. Department of Education has publicly embraced the use of race-targeted scholarships by colleges and universities in several enumerated circumstances, including when a college or university seeks to attain a diverse student body. *See* "Final Policy Guidance," 59 Fed. Reg. 8756, 8759-62 (Feb. 23, 1994).[6] The Final Policy Guidance was developed after a lengthy deliberative process that included an extensive analysis of applicable legal authorities and public comments, and reflects a reaffirmation of federal policies in force for many years. *See* H.R. Rep. No. 411, 102d Cong., 1st Sess. 7-8 (Dec. 4, 1991) (noting rulings by federal officials in the early 1980s approving minority-targeted aid programs).

Based on the teachings of *Bakke* and its progeny, and the U.S. Department of Education's long-standing position on voluntary affirmative action efforts to promote student diversity, "thousands of public educational institutions, attempting to provide a more diverse group of students and faculty, have, of their own volition, followed Justice Powell's direction ... to consider minority status as one among many relevant factors." *Scholars' Reply to*

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[5](...continued)
1996). In that letter ruling, OCR states that "[u]nder published OCR policy, which is based on ... [*Bakke*], race and national origin may be used as a factor in higher education admissions ... [when supported by a compelling interest, such as] obtaining the educational benefits of a diverse student body." *Id.* at 12. *See also University of California at Berkeley School of Law*, OCR Case No.10906001 (Sept. 25, 1992); *University of California, San Diego*, OCR Case No. 09-92-2002 (Mar. 21, 1994).

[6] *See also University of Wisconsin, Whitewater*, OCR Case No. 05-90-2106 (Oct. 27, 1994) (finding that statutory race-targeted scholarship program for purposes of meeting institution's diversity objective did not violate Title VI).

Professor Fried, 99 YALE L.J. 163, 166 (1989).[7] Similarly, many states have enacted statutes recognizing the obligation of their public higher education institutions to serve all of their citizens and the concomitant educational benefits derived from a diverse student body.[8] For these reasons,

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[7] At the trial below, for example, the Dean of the Stanford University Law School testified that he "thought we were meeting the requirements of *Bakke*" at the time that school's admissions program was devised. R. Doc. 213 at 19. *See also* Tribe, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1529 (2d ed. 1988) (The Supreme Court in *Bakke* "upheld the kind of affirmative action program used by most American colleges and universities."); Alenikoff & Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 593 (1993) (concluding that Justice Powell's diversity analysis "has achieved widespread institutional incorporation and employers and institutions of higher education have relied on it for the past 15 years."); N.Y. TIMES, Mar. 22, 1996, at A26, col. 1 (editorial) (stating that "Justice Powell's announcement has soundly been regarded as the rule of the *Bakke* case for nearly a generation," and that "[f]or two decades the governing principle of affirmative action in higher education has been that race and ethnicity may be a factor, but only one factor, in choosing among applicants in pursuit of the legitimate purpose of a diverse student body.").

[8] For example, the governing body of the University of Maryland System has been charged to undertake good faith efforts to "assure that women and minorities are equitably represented among the student body ... so that the University reflects the diversity of the State's population." MD. EDUC. CODE ANN. § 12-107(a)(3) (1992). The State of Connecticut has authorized its Board of Governors of Higher Education to "develop a strategic plan ... to ensure that students ... at each institution are representative of the racial and ethnic diversity of the total population of the state." CONN. GEN. STAT. § 10a-11(a) (1996). The State of Wisconsin "finds it in the public interest to

(continued...)

many States have adopted special programs to assist in recruiting members of underrepresented groups to their educational institutions.[9]

Simply put, the decision below is flatly inconsistent with both the well-settled case law supporting the use of race as a factor in securing diversity in the "unique context" of higher education, App. at A70 n.21 (Wiener, J., specially concurring), *and* the long-standing advice and guidance from the U.S. Department of Education. As such, the Court

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[8](...continued)
provide a system of higher education which enables students of all ages, backgrounds and levels of income to participate in the search for knowledge and individual development ... and which fosters diversity of educational opportunity." WIS. STAT. § 36.01(1) (1992). *See also* FLA. STAT. § 228.2001(4) (1989) (requiring public higher educational institutions to "develop and implement methods and strategies to increase the participation of students of a particular race ... in programs and courses in which students of that particular race ... have been traditionally underrepresented.").

[9] *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1639 (1991) (establishing a university recruitment and retention program directed at economically disadvantaged, minority and underrepresented student populations); ARK. STAT. ANN. § 6-81-802 (1987) (establishing a loan program to assist and encourage black and other minority Arkansans to enter and complete programs leading to certification as public school teachers); IDAHO CODE § 33-4602 (1995) (establishing "Idaho Minority and 'At-Risk' Student Scholarship Act"); IOWA CODE § 261.101 (Supp. 1995) (establishing "Minority Academic Grants For Economic Success"); MONTANA CODE ANN. § 20-25-421(4)(a) (1995) (authorizing the University of Montana System to waive tuition and fees for persons of one-fourth Indian blood in residency in the State); NEB. REV. STAT. § 85-1,125 (1995) (establishing scholarship program for Black, American Indian, and Hispanic minority groups).

of Appeals' decision throws into uncertainty and turmoil a wide variety of race-conscious programs that States have developed in good-faith reliance on *Bakke* to further the compelling interest in fostering diversity.[10]

Amici cannot overstate the importance of *Bakke* and the impact of the Court of Appeals' decision in anticipatorily overruling it. Justice Powell's views on the use of race to further the compelling interest of diversity have been firmly entrenched in the fabric of higher education for almost twenty years, and State and higher education officials have "ordered their thinking and living around that case." *Planned Parenthood v. Casey*, 505 U.S. 833, 835 (1992) (referring to the importance of *Roe v. Wade*, 410 U.S. 959 (1973), in that context). "A vote to overturn *Bakke*, and to forbid all racial preferences in higher education, would be far more socially disruptive than a decision allowing each state to make up its own mind about abortion restrictions," and "would precipitate resegregation on a national scale." Rosen, *The Day The Quotas Died*, THE NEW REPUBLIC, Apr. 22, 1996, at 24, 25.[11] An issue of such significant

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[10] In an attempt to mitigate the confusion surrounding race-based programs since the Court of Appeals' decision was issued, a senior U.S. Department of Education official felt compelled to remind the States that *Bakke* still is one of "the governing precedents for the Department and all fifty states." Healy, *Education Department Urges Public Colleges to Keep Affirmative-Action Programs*, THE CHRONICLE OF HIGHER EDUCATION, May 3, 1996, at A27. Raymond C. Pierce, Deputy Assistant Secretary for Civil Rights, separately explained that the Department is "saying to states, particularly those outside of the Fifth Circuit, that Supreme Court law still rules the nation, so don't act in haste here." *Id.*

[11] *See also* Applebome, *Universities Troubled by* (continued...)

constitutional and social magnitude should not be decided by a lower court, but "by the Supreme Court of a Nation dedicated to the rule of law." *Casey*, 505 U.S. at 865.

II. STATE EXECUTIVE BRANCH OFFICIALS ARE CONSTITUTIONALLY PERMITTED TO DETERMINE THE NEED FOR RACE-CONSCIOUS MEASURES AT PUBLIC UNIVERSITIES TO REMEDY THE PRESENT EFFECTS OF A STATE'S PAST DISCRIMINATION.

This Court should review the decision of the Court of Appeals for the additional reason that the panel opinion virtually eliminates the ability of State executive officials voluntarily to employ race-conscious measures at public universities to correct the present effects of past segregation and discrimination in education.

States have a well-recognized compelling interest in correcting their own past discrimination. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503-04 (1989). As Justice Kennedy has explained, a "State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Id.* at 518 (Kennedy, J., concurring). The Court of Appeals gave passing recognition to this principle, App. at A33-34, but then emasculated it in three significant ways.

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[11](...continued)
Decision Limiting Admission Decisions, N.Y. TIMES, Mar. 21, 1996, at A1 ("legal and education experts said ... *Hopwood v. Texas*, ... often dubbed *Bakke II*, had the potential to end affirmative action programs that give preference to minority applicants at state schools nationwide and had further enflamed one of the most contentious issues in American education.").

First, the Court of Appeals held that only past discrimination by the University of Texas School of Law itself could serve to justify race-conscious remedial measures at the School of Law. App. at A36, 40. Such a holding illogically and unrealistically divorces the School of Law from the rest of the University and from the Texas system of higher and lower education of which the School of Law is only one part.[12] Moreover, as this Court held in *Croson*, "the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination." 488 U.S. at 503-04. If there are university-wide, system-wide or statewide findings of continuing effects of prior discrimination, then a State should be permitted to address those effects at the micro level of a program, department or school where the relevant decisions are made, as well as at the macro level through university, system or state policies and programs.

Second, the Court of Appeals held that only the State legislature, not any other governmental body or official, could determine the necessity for remedial measures. App. at A39. This ruling is contrary to this Court's prior

[12] There is no evidence that the School of Law has discriminated against any of its recent applicants, so, according to the Court of Appeals, the School of Law cannot employ race-conscious remedial measures in admissions, regardless of the amount of discrimination practiced by the rest of the University of Texas, by other Texas public higher education agencies, or by Texas elementary and secondary school systems. The same reasoning would apparently apply to other graduate and professional programs and to undergraduate admissions. Texas would thus be faced with an undeniable history of racial discrimination and a legally compelling interest in remedying that racial discrimination, but no acceptable race-conscious method of addressing that history or interest.

decisions deferring to "legislative, *judicial, or administrative*" findings of the necessity for affirmative action. *Bakke*, 438 U.S. at 307 (emphasis added); *Croson*, 488 U.S. at 497.[13] Moreover, this Court has recognized the right of *employers* to gather their own evidence in order to remedy voluntarily the effects of past discrimination. *See, e.g., Wygant*, 476 U.S. at 277; *id.* at 290-93 (O'Connor, J., concurring); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). A State should certainly be entitled to that much or more latitude in correcting its own past mistakes, and it should be constitutionally insignificant whether a State chooses to address such issues by legislative action, or by executive action through its Governor, a statewide coordinating board, or other administrative bodies or officials.[14]

Third, the Court of Appeals wholly excluded from consideration several legitimate present effects of past discrimination. App. at A43. The District Court had found that the "'evidence presented at trial indicates those effects include the law school's lingering reputation in the minority

[13] It is also unrealistic and unworkable to force a legislature to determine what individualized consideration may be given to tens of thousands of applicants to a State's institutions of public higher education.

[14] Pursuant to Justice Powell's recognition that findings of past discrimination can be made by "administrative bodies [that] have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies," *Bakke*, 438 U.S. at 302 n.41, in Maryland the responsibility for equal educational opportunity and desegregation in postsecondary education has been primarily vested in the Maryland Higher Education Commission, with some of the responsibility shared with the institutions themselves. *See* MD. EDUC. CODE ANN. §§ 10-204(8), 11-105(e), 12-107 (1992).

community, ... an underrepresentation of minorities in the student body; and some perception that the law school is a hostile environment for minorities.'" App. at A41. The Court of Appeals rejected the first and third of these effects as a matter of law, App. at A41, and it rejected the underrepresentation rationale by referring narrowly only to the Law School's own recent nondiscriminatory practices and to the history of how the admissions process was adopted. App. at A44-46.

In contrast to such summary and restrictive treatment, a court should examine any and all actual present effects of past discrimination that are found to exist by an appropriate State actor, as this Court has ordered in elementary and secondary education desegregation cases. *See, e.g., Board of Education v. Dowell*, 498 U.S. 237, 250 (1991) (reiterating that the "vestiges" inquiry should include student assignments, as well as "every facet of school operations -- faculty, staff, transportation, extracurricular activities and facilities.").[15] The complexities of past discrimination and its possible present effects are determinations of fact that should not be decided peremptorily as matters of law, and in this case the record fully supported consideration of more than one present effect of past discrimination in Texas.

These three severe limitations that the Court of Appeals imposed have far-reaching implications not just for Texas, but also for many other States that are attempting to remedy the present effects of past discrimination in education. Over

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[15] *See also* Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. LAW & POL'Y REV. 61, 66 (1992) (identifying low minority test scores and high dropout rates as common "educational vestiges" of segregation in lower education).

a third of the States have been implicated in litigation involving *de jure* discrimination in postsecondary education.[16] Most of those States achieved compliance with the requirements of Title VI in their systems of higher education only in the late 1980's and early 1990's, and the Office for Civil Rights has announced that it will continue to monitor and investigate those States' compliance with OCR's regulations and this Court's ruling in *United States v. Fordice*, 505 U.S. 717 (1992). 59 Fed. Reg. 4271 (Jan. 31, 1994). Moreover, even after achieving such compliance, the higher education systems in those States may still suffer from continuing effects of their prior discrimination and segregation that may justify race-conscious remedial measures in certain circumstances.[17]

The Court of Appeals' limitations on who may be considered the relevant actor when assessing the need for remedial action, and its restrictions on the depth and quality of the evidence that may be considered, are particularly far-reaching because of the widespread segregation and

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[16] *See, e.g., United States v. Fordice*, 505 U.S. 717 (1992); *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994); *United States v. Louisiana*, 9 F.3d 1159 (5th Cir. 1993); *Richardson v. Blanton*, 597 F.2d 1078 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979); *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973).

[17] *Cf. Dowell*, 498 U.S. at 245-46 (noting differences in usage of "unitary" status, and recognizing that under some usages "a school district could be called unitary and nevertheless still contain vestiges of past discrimination"); *id.* at 249-50 (noting that school board complied with desegregation decree in good faith from 1972, through the 1977 termination of the case and until 1985; and identifying good faith compliance with a decree and "whether the vestiges of past discrimination had been eliminated to the extent practicable" as separate inquiries).

discrimination in elementary and secondary education. This unfortunate history was never limited to southern or border States, but occurred across the country.[18] Many of the efforts to desegregate lower education have been unsuccessful, and in some cases the courts have simply abandoned their oversight without successfully integrating the schools.[19] In other cases, the findings of "unitary" status have been fairly recent, and certainly too recent for schoolchildren to have progressed all the way through integrated, nondiscriminatory systems ready to enter higher education.[20] Thus, affirmative action in higher education admissions remains necessary in many circumstances to address the failures in desegregating lower education.

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[18] *See, e.g., Milliken v. Bradley*, 433 U.S. 267 (1977) (Michigan); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (California); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (Colorado); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (Ohio); *Hart v. Community School Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975) (New York).

[19] *See, e.g., Ross v. Houston Indep. School Dist.*, 699 F.2d 218 (5th Cir. 1983) (declaring Houston school system unitary, although demographic and other changes rendered effective student integration impractical); *see generally* Kunen, *The End of Integration* (cover story), TIME, Apr. 29, 1996, at 39 (quoting one commentator observing that the courts are simply giving up because "it's too hard").

[20] According to one report, over 500 school districts across the country remained subject to court-ordered desegregation decrees as late as 1991. McCarthy, *Elusive "Unitary Status"*, 69 EDUC. L. REP. 9 (West 1991). *See also* Tatel, at 63 (summarizing continuing court-ordered desegregation plans across the country, and noting that of the 45 largest urban school districts, 13 remained under active court supervision, 17 were under court orders but inactive supervision, and 8 had adopted voluntary desegregation plans).

In sum, the Court of Appeals' decision casts substantial doubt on the ability of the States to address the compelling interest of remedying the present effects of past discrimination in higher or lower education. Review is warranted for this additional reason.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 30, 1996

SUPREME COURT OF THE UNITED STATES

TEXAS ET AL. *v.* CHERYL J. HOPWOOD ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 95-1773. Decided July 1, 1996

The petition for a writ of certiorari is denied.

Opinion of JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, respecting the denial of the petition for a writ of certiorari.

Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' *judgments* that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. Acknowledging that the 1992 admissions program "has long since been discontinued and will not be reinstated," Pet. for Cert. 28, the petitioners do not defend that program in this Court, see Reply to Brief in Opposition 1, 3; see also Brief for United States as *Amicus Curiae* 14, n. 13 ("We agree that the 1992 [admissions] policy was constitutionally flawed . . . ."). Instead, petitioners challenge the *rationale* relied on by the Court of Appeals. "[T]his Court," however, "reviews judgments, not opinions." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984) (footnote omitted). Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition. See Reply to Brief in Opposition 2 ("[A]ll concede this record is inadequate to assess definitively" the constitutionality of the law school's current consideration of race in its admissions process.).